STATE OF MICHIGAN

COURT OF APPEALS

STEVEN VALENTINE, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED October 20, 2009
v	No. 286622 Oakland Circuit Court
BARCLAY ASSOCIATION, Defendant-Appellee/Cross-Appellant.	LC No. 2007-080723-CH

Before: Saad, C.J., and O'Connell, and Zahra, JJ.

PER CURIAM.

Plaintiff, Steven Valentine, appeals the trial court's order that granted summary disposition to defendant, Barclay Association. On cross-appeal, Barclay Association challenge's the trial court's award of one-third of its attorney fees. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I. Facts and Procedural History

Valentine owns a condominium in the Barclay condominium development and Barclay Association is a nonprofit corporation formed under the Michigan Condominium Act for purposes of managing the Barclay Condominium development. Valentine sued Barclay Association for negligence because he claims his condominium was damaged when Barclay Association's subcontractor, Kearns Brothers, Inc., replaced his roof. Valentine also sued for slander of title because Barclay Association placed a lien on his property after he stopped paying his assessment fees. According to Valentine, he intentionally withheld the assessments because Barclay Association failed to repair his condominium. Thereafter, Barclay Association filed a counter-complaint and sought to collect the amount owed by Valentine or to foreclose on the condominium.

The trial court granted Barclay Association's motion for summary disposition and held that it is not liable for slander of title or for negligence and that Valentine was not statutorily permitted to withhold his assessments for Barclay Association's alleged failure to repair his condominium. The court further held that Barclay Association is entitled to the assessments, plus interest and attorney fees. The trial court ultimately awarded Barclay Association one-third of its attorney fees to reflect the amount spent on efforts to collect the unpaid assessments. The

court declined to award Barclay Association additional attorney fees for defending plaintiff's negligence and slander of title claims.

II. Analysis

A. Summary Disposition

Valentine contends that the trial court incorrectly granted summary disposition to Barclay Association on his negligence claim.[1] In his complaint, Valentine alleged that Barclay Association should be held liable because Kearns Brothers negligently damaged walls in his condominium as Kearns Brothers replaced his roof. In other words, Valentine takes the position that Barclay Association is vicariously liable for the allegedly negligent[2] acts of the company it hired to perform the roof replacement. As this Court explained in *Jenkins v Raleigh Trucking Services, Inc*, 187 Mich App 424, 428; 468 NW2d 64 (1991):

> Generally, one who employes an independent contractor is not vicariously liable for the contractor's negligence. *Janice v Hondzinski*, 176 Mich App 49, 53; 439 NW2d 276 (1989). An employer is not responsible for injuries caused by a carefully selected contractor to whom he has delegated work. However, this rule does not apply if the employer did not truly delegate but rather retained control of the work. *Warren v McLouth Steel Corp*, 111 Mich App 496, 502; 314 NW2d 666 (1981).

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[1] "A trial court's decision on a motion for summary disposition is reviewed de novo." *Houdek v Centerville Twp*, 276 Mich App 568, 572; 741 NW2d 587 (2007).

> A motion for summary disposition based on MCR 2.116(C)(10) tests the factual support for a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(3)(b); *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). The moving party must specifically identify the undisputed factual issues and support its position with evidence. MCR 2.116(G)(4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider the submitted evidence in the light most favorable to the nonmoving party, but may not make findings of fact or weigh credibility in deciding the motion. *Id.*; *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with supporting evidence that a genuine and material issue of disputed fact exists. MCR 2.116(G)(4); *Maiden, supra* at 120-121. In the absence of any genuine issue of material fact, summary disposition may be granted to the party entitled to it as a matter of law. MCR 2.116(G)(4) and (I)(1) and (2). [*Reed v Reed*, 265 Mich App 131, 140-141; 693 NW2d 825 (2005).]

[2] The court did not reach the issue whether Kearns Brothers exercised reasonable care when it replaced the roof.

"The rationale for this rule is that an independent contractor is not subject to the control of the employer, and therefore the employer should not be held vicariously liable for actions outside its control." *Janice, supra* at 53.

This rule applies here. Through its bylaws, Barclay Association is responsible for the maintenance of the "common elements" in the condominium complex. The parties agree that the roofs of the condominium buildings are "common elements." Barclay Association hired Kearns Brothers to perform the roof replacement. There is no dispute that Kearns Brothers was an independent contractor and Valentine does not allege that Barclay Association retained any control over the roofing work. Accordingly, as a matter of law, Barclay Association cannot be held vicariously liable for damages caused by Kearns Brothers' allegedly negligent conduct when it replaced the roof over Valentine's condominium.

Valentine cites Restatement Contracts, 2d § 318 and argues that Barclay Association could not delegate to Kearns Brothers its general duty of due care. Valentine appears to take the position that, because the bylaws required Barclay Association to maintain the roof, it had a contractual duty to Valentine to use due care in the performance of that duty and that § 318 prohibits Barclay Association from delegating that duty to a contractor like Kearns Brothers. We note, as a preliminary matter, that Valentine did not bring a claim for breach of contract and his attorney specifically denied that he intended to assert a claim for breach of contract. In any case, if a party seeks to impose tort liability arising out of a contract, the plaintiff must establish that the defendant owed him a duty that was separate and distinct from the obligations contained in the contract. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The crux of Valentine's argument is that Barclay Association should be held liable because of Kearns Brothers's failure to replace the roof in a skillful manner. However, Valentine points to no separate and distinct duty owed to him. Accordingly, no negligence claim arises out of a contract in this case.

Moreover, § 318 does not support Valentine's argument that Barclay Association is liable for Kearns Brothers's alleged negligence. Section 318 states that, generally, the performance of a contract may be delegated to another, unless delegation is contrary to public policy or the terms of the contract. While it is true that an employer may not be held vicariously liable in negligence for the conduct of an independent contractor, the delegation of a contractual duty to an independent contractor does not eliminate the contractual duty owed by the obligor. In other words, while Barclay Association cannot be liable in tort under these facts, if Kearns Brothers failed to finish the roofing work, its assignment of the job to Kearns Brothers would not eliminate Barclay Association's obligation to have the job completed. But, because Valentine's claim is for negligence, under Michigan law Barclay Association is not liable for the alleged negligence or misconduct of Kearns Brothers.

Valentine relies on the same reasoning to argue that he is entitled to a set off for his assessment payments because Barclay Association breached its contractual obligation under the condominium bylaws. Valentine characterizes this as a defense to Barclay Association's claim that it is entitled to recover the unpaid assessments. However, for the above reasons, Valentine's claim lacks merit. Again, Barclay Association is not liable for Kearns Brothers's alleged negligence and Barclay Association is not liable for a tort arising out of a contract.

The trial court agreed with Barclay Association that, under MCL 559.239, Valentine was not permitted to withhold his assessment payments until Barclay Association agreed to repair his condominium. It appears that Valentine believed his circumstances are similar to those involving a landlord and tenant. Generally, a landlord must keep premises in reasonable repair and ensure that common areas are maintained. MCL 554.139(1). Our courts have ruled that, as a defense to an eviction proceeding for nonpayment of rent, a tenant may argue that rent was justifiably withheld because of the landlord's failure to comply with those statutory duties. See *Rome v Walker*, 38 Mich App 458; 196 NW2d 850 (1972).

However, landlord-tenant laws do not apply to condominium owners and condominium associations. Pursuant to MCL 559.165, "[e]ach unit co-owner, tenant, or nonco-owner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project and [the Condominium Act]." Under MCL 559.239, the remedy for a condominium association's alleged misconduct is to file a claim in court, not to withhold assessment fees. *Newport West Condominium Ass'n v Veniar*, 134 Mich App 1, 11; 350 NW2d 818 (1984). Indeed, MCL 559.239 specifically provides that "[a] co-owner may not assert in an answer, or set off to a complaint brought by the association for non-payment of assessments the fact that the association of co-owners or its agents have not provided the services or management to a co-owner(s)."

Valentine claims that MCL 559.239 does not apply because he did not withhold his assessments for lack of services, but because his property was damaged during the roof replacement. However, in his letter to Barclay Association of November 15, 2005, Valentine's counsel specifically stated that Valentine would withhold his assessments if Barclay Association failed to inspect and repair his condominium. Thus, Valentine intentionally withheld his assessments because Barclay Association did not provide him a specific "service," the repair of his condominium, and this is prohibited by the statute. Moreover, it is axiomatic that, if Valentine wanted to pursue a negligence claim against Barclay Association, the proper venue for such an action would be in a court of law. And, Valentine has not cited any legal basis for his decision to withhold his assessment payments based on his tort allegation. Accordingly, Valentine's "defense" for failing to pay his assessments is unavailing and the trial court correctly ruled that Barclay Association did not slander Valentine's title by filing a lien on his property.

II. Attorney Fees

On cross-appeal, Barclay Association contends that the trial court should have awarded it attorney fees for having to defend Valentine's slander of title and negligence claims.[3] The

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[3] As this Court explained in *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 438; 695 NW2d 84 (2005):

> Generally, where attorney fees are awarded by the trial court, we review the award for an abuse of discretion. See *Stoudemire v. Stoudemire*, 248 Mich App 325, 344; 639 NW2d 274 (2001). However, any questions of law that affect

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Condominium Act provides for the recovery of attorney fees in various situations. Under MCL 559.206(b), "[i]n a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide." MCL 559.207 provides:

> A co-owner may maintain an action against the association of co-owners and its officers and directors to compel these persons to enforce the terms and provisions of the condominium documents. In such a proceeding, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent that the condominium documents expressly so provide. A co-owner may maintain an action against any other co-owner for injunctive relief or for damages or any combination thereof for noncompliance with the terms and provisions of the condominium documents or this act.

Moreover, in a foreclosure action to recover assessment payments, an association is entitled to attorney fees pursuant to MCL 559.208(2):

> A foreclosure shall be in the same manner as a foreclosure under the laws relating to foreclosure of real estate mortgages by advertisement or judicial action except that to the extent the condominium documents provide, the association of co-owners is entitled to reasonable interest, expenses, costs, and attorney fees for foreclosure by advertisement or judicial action. The redemption period for a foreclosure is 6 months from the date of sale unless the property is abandoned, in which event the redemption period is 1 month from the date of sale.

As noted above, the trial court awarded Barclay Association attorney fees for its attempts to recover the unpaid assessments from Valentine, but it declined to award Barclay Association attorney fees to defend Valentine's claims of negligence and slander of title. The trial court's award was appropriate under MCL 559.206 and 559.208 because Barclay Association found it necessary to file an action to collect Valentine's assessments and to foreclose on the lien on Valentine's property. However, Barclay Association claims that, pursuant to MCL 559.207, it was entitled to collect attorney fees for all of the litigation in this case. The trial court reasoned that MCL 559.207 does not require the award of attorney fees for defending tort claims and so the court declined to award them.

We hold that the trial court correctly ruled that MCL 559.207 does not require the payment of attorney fees for Barclay Association's defense of Valentine's tort claims. The statute permits a condominium owner to sue an association to compel the enforcement of provisions in the condominium documents. However, Valentine's claims were for negligence and slander of title and those claims did not involve a suit to compel the association to enforce

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the determination are reviewed de novo. See *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477, 486; 682 NW2d 519 (2004).

provisions in the condominium documents. Accordingly, Barclay Association was not statutorily entitled to attorney fees for its defense of Valentine's claims.

We note, however, that the condominium bylaws provide that, if a tenant "defaults" under the condominium documents, which would include a failure to pay assessments, the association is entitled to recover attorney fees if it prevails in a legal action, as well as "costs and attorney fees incurred in defending any claim, counterclaim or other matter from the [condominium owner] asserting same." Article XVII, § 1(b). Accordingly, Barclay Association has a valid argument that it is entitled to recover all of its costs and attorney fees under the condominium bylaws.

The trial judge noted that Barclay Association failed to raise in its motion for summary disposition its claim for attorney fees for defending Valentine's negligence and slander of title claims. However, the parties fully briefed their arguments with regard to the payment of attorney fees and costs following the trial court's decision on the motion for summary disposition and the trial court held a separate hearing on the matter. Barclay Association specifically argued that it is entitled to attorney fees and costs for pursuing the assessments and for defending Valentine's claims. However, rather than considering whether Barclay Association might be entitled to recover its fees and costs under the bylaws, the trial court merely concluded that, because the statutes do not *require* the payment of those fees, the court would not award them. "Generally, attorney fees are not recoverable . . . unless expressly allowed by statute, court rule, common-law exception, or contract." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 297; 769 NW2d 234 (2009). Here, again, the bylaws provide for the payment of attorney fees to the condominium association for defending unsuccessful claims brought by condominium owners. Because the trial court did not consider this, we reverse the trial court's denial of two-thirds of Barclay Association's requested attorney fees and remand the case for further consideration of this issue.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra