STATE OF MICHIGAN

COURT OF APPEALS

J. EDWARD KLOIAN,

Plaintiff-Cross-Appellant,

v

THOMAS EDWARD VAN FOSSEN, Personal Representative of the Estate of William Van Fossen, Deceased,

Defendant/Third-Party Plaintiff-Appellee/Cross-Appellee,

and

VICTOR T. WEBER,

Third-Party Defendant/Intervenor-Appellant.

UNPUBLISHED
January 21, 2010

No. 287812
Washtenaw Circuit Court
LC No. 84-028688-CK

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

This appeal and cross-appeal represent yet another link in the chain of complex and protracted litigation concerning a certain tract of real property located at 400-416 West Huron Street in the city of Ann Arbor (the property). In 2007, this Court remanded the matter to the circuit court to allow Victor T. Weber (Weber) to intervene and for a determination whether Weber possessed any rights or interests in the property. *Kloian v Van Fossen*, unpublished opinion per curiam of the Court of Appeals, issued March 29, 2007 (Docket Nos. 262953; 262954) (*Kloian I*). On remand, the circuit court determined that Weber possessed no rights or interests in the realty, and issued an order granting summary disposition in favor of defendant Thomas Edward Van Fossen (Van Fossen). Weber now appeals by right, arguing among other things that the circuit court lacked jurisdiction over him on remand because he had previously been dismissed from this action, that he was not adequately notified of the circuit court proceedings on remand, and that he possessed a valid real estate mortgage in the property which was improperly extinguished by the circuit court. Plaintiff J. Edward Kloian (Kloian) cross appeals, arguing among other things that the circuit court improperly denied him the opportunity to be heard on remand, that he and Weber were prejudiced because Van Fossen's motion for summary disposition was prematurely decided, that there existed genuine issues of material fact

precluding the grant of Van Fossen's motion for summary disposition, and that this matter should be remanded to a different circuit judge. We affirm in all respects, albeit partially for different reasons than those relied on by the circuit court. This matter should now be considered closed.[1]

I. Basic Facts and Procedural History

This Court previously summarized the early factual background of this dispute in *Kloian I*, slip op at 2:

> In 1978, Kloian leased the Property to William Van Fossen.[2] At the same time, Kloian granted Van Fossen an option to purchase the Property. A dispute later arose between the parties over nonpayment of rent, alleged breaches of the lease agreement, and whether an option was effectively terminated or exercised. In 1984, Kloian sued Van Fossen for unpaid rent. Kloian then filed an amended complaint, seeking a declaration that he terminated the option. Van Fossen filed several counterclaims, including a request for specific performance of the option to purchase the Property.
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> In 1991, the circuit court held that Van Fossen was entitled to specific performance. In 1995, the circuit court ordered that the parties enter into a land contract for the sale of the Property to Van Fossen.

Pursuant to the circuit court's order, the parties entered into a land contract for the purchase of the property on May 12, 1995, which was recorded three days later. Because there remained outstanding disputes concerning costs and attorney fees, the circuit court action remained open. Under the terms of the land contract, Kloian was to sell the property to Van Fossen for the purchase price of $340,000, payable in full, with interest, by May 12, 1996. Section 3(a) of the land contract provided that "Seller may mortgage the premises as security for Seller's debts so long as the mortgage does not adversely affect any of Purchaser's rights under this contract."

In January 1997, eighteen months after the land contract was executed, Kloian mortgaged his vendor's interest to Weber for $200,000. The mortgage note provided that Kloian would pay back the mortgage indebtedness in full, with interest, by no later than January 6, 1999. The mortgage was timely recorded.

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[1] We have revised the caption in this case to reflect the true relationships among the various parties. See MCR 7.216(A)(2). In particular, we have designated Weber as an "Intervenor" in accordance with this Court's remand instructions in *Kloian I*. See footnote 9.

[2] William Van Fossen died during the pendency of this matter, and the court permitted substitution by his personal representative Thomas Van Fossen. This substitution has had no relevant procedural effect for purposes of this case, and we therefore refer to both William Van Fossen and his personal representative as "Van Fossen" throughout this opinion.

According to Kloian, Van Fossen failed to pay off the land contract by May 1996, and Kloian was therefore unable to timely pay off his mortgage indebtedness to Weber. Weber, a resident of Nevada, thereafter filed a foreclosure action in the United States District Court for the Eastern District of Michigan in May 2004. In response, Van Fossen moved in November 2004 to add Weber as a necessary party to the Washtenaw Circuit Court case, asserting that Weber's presence was necessary for the circuit court to adjudicate Van Fossen's interest in the property. In *Kloian I*, slip op at 13, this Court succinctly explained what happened next:

> On November 12, 2004, Weber quitclaimed his interest in the Property back to Kloian with a purported reservation of Weber's rights pursuant to the mortgage agreement. Thereafter, Kloian moved for denial of Van Fossen's motion to add Weber, arguing that he was no longer a necessary party in light of the latter quitclaim deed. Kloian argued that, as simply a mortgagee rather than a property owner, Weber was not an affected party. Nevertheless, the circuit court granted Van Fossen's motion to add Weber as a necessary party.
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> In December 2004, Van Fossen filed a third-party complaint against Weber, seeking a declaration of Weber's rights in the Property. In his complaint, Van Fossen asserted: "Weber appears to have a legal interest in the Property that must be determined and adjudicated in order for [Van Fossen] to receive clear and marketable title to the Property."

On April 14, 2005, the circuit court held an evidentiary hearing for the purpose of determining the interests of the parties and the exact amounts owed by Kloian and Van Fossen in this case. At the hearing, Weber's counsel admitted that whatever interest Weber had in the property was "secondary to . . . the Van Fossen interest" and that Weber was "willing to stipulate that his mortgage is subordinate to Mr. Van Fossen's land contract interest." The circuit court noted that former Washtenaw Circuit Judge Karl Fink had already ruled in 1996 that Kloian owed Van Fossen substantial attorney fees in this matter—which it referred to as "exemplary damages." The court then reconfirmed that Kloian did, indeed, owe substantial attorney fees as a result of his fraud and illegal conduct, as well as his improper and unnecessary attempts to prolong the litigation. The circuit court took testimony concerning the nature of Van Fossen's legal expenses and which of the expenses were attributable to Kloian's improper conduct. The court also heard testimony concerning the outstanding balance due on the land contract between Kloian and Van Fossen. After hearing the testimony, the circuit court remarked from the bench:

> All right, first of all I'm going to go backwards on this matter. This Court is in no position to make an equitable ruling on the equitable relief sought by the third-party Plaintiff here again with regard to this alleged Weber mortgage. I think that's due in large part to the circumstances of this litigation. I'm going to find that the motion to allow the filing of the third-party complaint was improvidently granted by the Court. I'm going to dismiss the third-party complaint without prejudice. Any mortgage interest claimed by Weber will need

> to be resolved in other litigation.[3] It's not going to be resolved in this lawsuit at this stage of the proceeding certainly.
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> It is important, however, to move on to make a final order with regard to the interests of the Defendant and the Plaintiff in this parcel . . . as well as the assessment of the attorney fees and expenses as previously ordered by Judge Fink based on his findings. I'm going to proceed to do that.
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> I have considered all of the various means of calculation here. This is an unusual assessment in the legal sense that attorney fees, actual attorney fees are not ordered absent a statute other than as exemplary damages. That was the assessment by Judge Fink in this case, and it remains this Court's obligation to determine the amount of those attorney fees.
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> I have considered all of these matters. I do not believe that the bankruptcy fees are included within the terms of that order or within the contemplation of Judge Fink in that order. I also believe that the proper assessment of fees would be attorney fees and expenses which are both reasonable and necessary on the one hand, and actually paid on the other hand.
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> Based on those findings I am going to find that the total amount of attorneys' fees and expenses [with] interest accruing as those fees and expenses were paid due from the Plaintiff to the Defendant in this case is $2,173,361.97. Now the Plaintiff is entitled to a credit for the amount owing on the balloon payment under the land contract. That . . . has been resolved through the course of this litigation.
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> The Court finds that the total amount due as of May 1st of this year on that land contract including all interest is $494,946.32. As [against] Mr. Kloian [Van Fossen] is entitled to ownership and fee of the property, and is further entitled to a balance due to [him] from [Kloian] of $1,678,415.65.

After finding that Van Fossen's earlier motion to file the third-party complaint had been "improvidently granted" and dismissing Weber from the action, the circuit court entered its final order in early May 2005. The court ruled that Van Fossen was entitled to attorney fees—again described as "exemplary damages"—in the amount of $2,173,361.97, and that Kloian was entitled to a setoff in the amount of $494,946.32, which represented the total amount that remained due and owing on the land contract. After deducting this setoff amount, the court entered final judgment in favor of Van Fossen in the amount of $1,678,415.65. The court ruled that Van Fossen had "satisfied all obligations under the Land Contract," transferred the property to Van Fossen "free and clear," and ordered the register of deeds "to accept this Judgment Entry

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[3] By "other litigation," the circuit court presumably meant that Weber's interest would be determined in the pending federal court foreclosure action.

as transferring any and all ownership interest of Kloian, his heirs, beneficiaries, mortgagees, lessees, and assignees in the real property . . . to Van Fossen."

This Court summarized the next steps of the litigation in *Kloian I*, slip op at 13-14:

> In May 2005, Weber filed against Van Fossen a claim of appeal from the circuit court's final judgment.
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> A few days later, Weber filed a post-judgment motion to intervene in the lower court action under MCR 2.209(A)(3), alleging that the final order negatively impacted his mortgage interest in the Property. After hearing oral arguments on the motion, the circuit court denied the motion, explaining its ruling as follows:
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> > With regard to the motion to intervene, I'm going to deny that motion. Of course, you can ask the Court of Appeals to intervene in the appeal which is really what you seek here anyway, but I'll leave that to them to determine if they want you in the appeal or not.
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> Weber then moved to intervene in this Court, which was denied.[4] This Court also later denied Van Fossen's motion to dismiss Weber's appeal for lack of jurisdiction.[5]

Also in May 2005, Kloian filed a claim of appeal from the same circuit court judgment. This Court consolidated Weber's appeal with Kloian's appeal "to advance the efficient administration of the appellate process."[6]

On appeal, Kloian argued that the circuit court erred by reforming the parties' original agreement and by granting specific performance to Van Fossen, thereby allowing him to complete his acquisition of the property. Among other things, Kloian also argued that Van Fossen had acted with unclean hands during the circuit court proceedings, that the circuit court had erred by awarding Van Fossen $2,173,361.97 in attorney fees, that the circuit court had erred by determining that the remaining balance due under the land contract was $494,946.32, and that the circuit court had applied an incorrect interest rate in reaching its calculations. This Court rejected Kloian's arguments, affirming the circuit court's ruling with respect to all of Kloian's claims of error. *Kloian I*, slip op at 2-12.

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[4] *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered March 22, 2006 (Docket No. 262954).

[5] *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered June 12, 2006 (Docket No. 262954).

[6] *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered August 1, 2005 (Docket Nos. 262953; 262954).

In contrast, this Court reversed and remanded for further proceedings with respect to Weber's claim of error. *Id*. at 12-17. Weber argued on appeal that he had a constitutionally protected mortgage interest in the property. He complained that although the circuit court's judgment had effectively extinguished this mortgage interest, he had not been entitled to intervene or meaningfully participate in the circuit court proceedings. As an initial matter, this Court observed that although Weber was no longer a "party" to the underlying action at the time of the circuit court's ruling because the third-party complaint had been earlier dismissed, he nonetheless had an interest in the subject matter of the litigation and had been aggrieved by the circuit court's ruling. *Id*. at 14-15. Accordingly, this Court determined that it had jurisdiction under MCR 7.203(A) to consider Weber's appeal of right—even though he was no longer technically a party to the circuit court proceedings. *Kloian I*, slip op at 15.

With respect to Weber's substantive claim, this Court held that Weber should have been permitted to intervene in the circuit court action. *Id*. at 16-17. Although this Court reserved judgment concerning exactly what type of interest Weber held in the property, it noted that he nevertheless held some kind of interest and should have been given a meaningful opportunity to be heard before the interest was extinguished by way of the circuit court's ruling. Indeed, the *Kloian I* Court held that "this Court is not the proper forum in which to litigate the exact nature of Weber's interest in the property. That determination should be made by the circuit court. Accordingly, we conclude that Weber did have a right to intervene in the lower court action." *Id*. at 16. This Court thus remanded to allow Weber to intervene and for a consideration of Weber's arguments. *Id*. at 17.[7]

On July 19, 2007, the United States District Court for the Eastern District of Michigan dismissed the still-pending federal foreclosure action without prejudice pursuant to the doctrine of abstention announced in *Colorado River Water Conservation Dist v United States*, 424 US 800; 96 S Ct 1236; 47 L Ed 2d 483 (1976). *Weber v Van Fossen*, 496 F Supp 2d 826, 831 (ED Mich, 2007). Weber thereafter appealed the dismissal of the federal action to the United States Court of Appeals for the Sixth Circuit.

Following remand, the circuit court held a status conference in early March 2008. No record of this status conference is contained in the lower court file. Indeed, the circuit court register of actions indicates that the status conference was "held off record." However, it was apparently decided at the status conference that Van Fossen would proceed by filing a motion for summary disposition as to Weber's purported interest in the property.[8]

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[7] On May 21, 2007, this Court denied reconsideration of its opinion in *Kloian I*. *Kloian v Van Fossen*, unpublished order of the Court of Appeals, entered May 21, 2007 (Docket Nos. 262953; 262954). Our Supreme Court denied Kloian's application for leave to appeal, *Kloian v Van Fossen*, 480 Mich 1003 (2007), and subsequently denied his motion for reconsideration as well, *Kloian v Van Fossen*, 480 Mich 1140 (2008).

[8] Kloian asserts in his brief on appeal that although he was notified of this status conference, the circuit court "refused to allow him to participate or even be present at the conference." As there is no record or transcript of the status conference contained in the lower court file, we cannot

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In April 2008, Van Fossen filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that it was beyond factual dispute (1) that he was the fee simple owner of the property, (2) that Kloian's interest was limited to that of a land contract vendor, (3) that the interest of a land contract vendor is an interest in personalty rather than in realty, and (4) that Kloian had not granted the mortgage to Weber until after the execution of the land contract. As a consequence, Van Fossen contended that Weber's mortgage actually encumbered only Kloian's personalty interest and not Van Fossen's realty interest, and asserted that Weber therefore had no recognizable interest in the real property.[9]

An amended proof of service contained in the lower court file indicates that Van Fossen's motion for summary disposition was sent via first-class mail on April 21, 2008, to Victor Weber at "9416 Gold Mountain Drive, Las Vegas, NV 89134-7800." According to the same proof of service, Van Fossen's motion for summary disposition was also sent on April 15, 2008, to Kloian, Kloian's former attorney Michael Mixer, and Weber's attorneys Hugh Davis and Glenn Matecun.[10] The circuit court scheduled a hearing on Van Fossen's motion for summary disposition for May 14, 2008.

On May 13, 2008, one day before the scheduled hearing, the circuit court received a response to Van Fossen's motion for summary disposition and a motion for stay from Weber's attorney Hugh Davis. Davis stated that although he had previously represented Weber on appeal to this Court in *Kloian I*, he had never before represented Weber before the circuit court, and was therefore making only a "limited appearance" on Weber's behalf. Indeed, it is true that attorney Glenn Matecun, and not Davis, had previously represented Weber in the circuit court. Davis

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assess Kloian's claim in this regard.

[9] In the caption of his motion for summary disposition, Van Fossen continued to list Weber only as a "Third-Party Defendant." However, this was clearly inaccurate as the original third-party complaint had earlier been dismissed and no new third-party complaint had ever been filed against Weber. Instead, the caption of Van Fossen's motion for summary disposition should have designated Weber as an "Intervenor," in accordance with this Court's remand instructions in *Kloian I*. We acknowledge that the circuit court never referred to Weber as an intervenor and never directed the parties to list Weber as an intervenor on their papers and filings. Nonetheless, it is clear from this Court's opinion in *Kloian I* that Weber's status following remand to the circuit court was that of an intervening party. We have therefore revised the caption of this case accordingly. See footnote 1.

[10] Although Van Fossen's motion for summary disposition was originally dated April 15, 2008, it was not date-stamped by the circuit court until April 28, 2008. Weber argues in his brief on appeal that it is highly unlikely that Van Fossen would have served the motion for summary disposition on him via first-class mail on April 21, 2008, when the motion was not even filed with the court until April 28, 2008. In essence, Weber attempts to attack the validity of the amended proof of service by suggesting that Van Fossen fabricated it after the fact. We reject Weber's suggestion. There is nothing in the court rules that requires a party to file his or her motion for summary disposition with the court before he or she serves it on the other party or parties. Indeed, it is common practice for a party to send his or her motion to the circuit court for filing on the same day that he or she serves it on the other parties via first-class mail. In such cases, the date of mailing on the proof of service will always be earlier than the date of filing that is ultimately stamped on the copy received by the court.

pointed out that Weber was a resident of Nevada and argued that the parties' diversity of citizenship militated in favor of staying the circuit court proceedings pending the outcome of the appeal in the federal action. Davis also asserted that Weber had not received a copy of Van Fossen's motion for summary disposition and that Weber therefore had inadequate notice that his rights and interests would be considered by the circuit court on May 14, 2008. Davis stated that he was personally very busy with an ongoing trial, and that he might be unable to appear at the hearing of May 14, 2008. Finally, Davis asserted that the courts had no authority to sua sponte reinstate Weber as a party to this matter, and that it was therefore necessary for Van Fossen to file new pleadings and take additional affirmative steps to reestablish personal jurisdiction over Weber before Weber could be brought back into the case. Attached to the response was the affidavit of Victor Weber, dated May 13, 2008, in which Weber averred that he was a resident of Nevada, that he never received a copy of Van Fossen's motion for summary disposition, and that he had just learned of the motion's existence "within the last few days."

Van Fossen and Weber were both represented by counsel at the motion hearing of May 14, 2008. Weber was represented by attorney Wilson P. Tanner, who indicated that he was "appearing in place of [attorney Davis], who I understand is appearing specially or in a limited fashion according to . . . the pleadings that I've read." Kloian was also personally present at the hearing, but it appears from the record that the circuit court refused to allow him to participate in the proceedings. Counsel for Van Fossen suggested that Weber had been properly reinstated as a party by this Court's opinion in *Kloian I*, and argued that there had consequently been no need to file new pleadings against him or to reacquire jurisdiction over him. Counsel for Van Fossen explained that she had originally sent copies of the motion for summary disposition to Weber's attorneys Matecun and Davis at the time the motion was prepared, but that she had thereafter decided to serve a copy of the motion on Weber personally as well. This is why the amended proof of service in the lower court file indicated that the motion had been sent to Weber in Nevada on April 21, 2008, while it had already been sent to Matecun and Davis on April 15, 2008.

Van Fossen's attorney asserted that because the United States District Court had dismissed the federal action on the basis of *Colorado River* abstention, there was no reason to stay the circuit court case. She then argued that Weber's mortgage interest was merely a security interest in Kloian's personalty, and was not an interest in the real property itself. She cited several cases for the proposition that a land contract vendor's interest is in the nature of personalty rather than realty.

Attorney Tanner noted that Davis had only asked him a day or two earlier to appear at the hearing. Tanner argued that the circuit court had previously dismissed Weber from the case and that Van Fossen had therefore been required to take some affirmative steps beyond the mere filing of a motion for summary disposition to reinstate him as a party. Tanner also contended that Weber had not been personally served with a copy of Van Fossen's motion for summary disposition. He suggested that service on Matecun and Davis was ineffective because Matecun no longer represented Weber and Davis had only represented Weber before the Court of Appeals.

The circuit court explained that, contrary to Tanner's assertion, Matecun was still counsel of record for Weber and that there had never been any order allowing Matecun to withdraw from the case. The court pointed out that both Matecun and Davis had been served with the motion

for summary disposition and that both attorneys had been notified of the scheduled motion hearing. The court observed that Matecun and Davis should have advised Weber of the proceedings. Tanner responded by arguing that Matecun and Davis "felt like they no longer represented [Weber] . . . ." Tanner asked the court to postpone the matter for "a couple of weeks" to allow "Mr. Davis to respond" to Van Fossen's motion for summary disposition. The circuit court noted that Weber's attorneys had already been given adequate time to respond, and that Weber had received adequate notice of his opportunity "to be heard on the nature of his alleged interest in this litigation."

In late July 2008, after the filing of certain objections by Weber, the circuit court issued an opinion and order granting Van Fossen's motion for summary disposition. The circuit court first observed that Weber had "cited no authority to support his contention that the . . . court must again establish jurisdiction over him." The court then went on to address this Court's remand instructions in *Kloian I* and the nature of Weber's mortgage interest:

> This Court provided Weber with the "opportunity to be heard" as required by the Court of Appeals and will decide his interest on the merits. It is well-settled Michigan law that a vendor's interest in the land contract is personal property. *Darr v First Federal Savings & Loan Assn*, 426 Mich 11 (1986). In contrast, the vendee's interest in the land contract is real property which descends to his heirs upon his death. *Darr, su[pr]a.* A land contract vendor holds legal title to the subject property only as a security interest to ensure payment on the land contract. *Organic Chemical Site PRP Group v Total Petroleum, Inc*, 58 F Supp 2d 755 (WD Mich, 1999).
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> The Court finds that there is no dispute that on January 6, 1997, when Kloian purported to grant a mortgage on the real property to Weber, Kloian was merely a land contract vendor. Therefore, Kloian could not impair Van Fossen's right to the land by a subsequent mortgage to Weber. Kloian could not convey, and Weber never had an interest in the real property above a mere lien on Kloian's land contract vendor interest.
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> The Court finds that Weber has no interest in the real property . . . nor is there any basis to preclude application of the setoff of payoff against the exemplary damages. The Court further finds that Van Fossen has satisfied all obligations under the land contract, and the real property . . . is hereby transferred to Van Fossen, free and clear of the land contract and the mortgage interest claimed by Weber. The Court further finds that the interests of Kloian, Weber, and Van Fossen are hereby resolved with respect to [the property]. The Court orders that the Register of Deeds and Recorder's Office shall accept this Judgment as transferring any and all ownership interests or land contract interests of Kloian, his heirs, beneficiaries, mortgagees, including but not limited to Weber, lessees, and assignees in the real property . . . .

On August 13, 2008, Weber, through attorney Davis, moved for reconsideration of the circuit court's opinion and order. Weber again argued that Van Fossen's service of the motion for summary disposition had been defective and that the service on attorneys Matecun and Davis was not sufficient to apprise him of the circuit court's proceedings on remand. He also

contended that the circuit court had effectively given impermissible retroactive effect to the land contract mortgage act, MCL 565.356 *et seq.*, and that Van Fossen's motion for summary disposition had been prematurely heard because it was considered fewer than 28 days after it was served. Weber's motion for reconsideration was denied.

Then, on August 28, 2008, Kloian moved to intervene or to set aside the circuit court's opinion and order on the ground that he had possessed a financial stake in the determination of Weber's interest but had been denied the opportunity to participate in the status conference and motion hearing. The circuit court ruled that because this Court had already fully and finally decided Kloian's interests in *Kloian I*, Kloian had no right to participate in the circuit court proceedings on remand. Accordingly, the motion was denied.

On September 16, 2008, Weber timely filed a claim of appeal of the circuit court's July 2008 opinion and order. Kloian filed a claim of cross appeal shortly thereafter.

On April 13, 2009, the United States Court of Appeals for the Sixth Circuit affirmed the United States District Court's earlier dismissal of Weber's federal foreclosure action, albeit not on the basis of *Colorado River* abstention. *Weber v Van Fossen*, 322 Fed Appx 429 (CA 6, 2009). The United States Court of Appeals observed that Weber's claims had been fully litigated and decided by the Michigan circuit court, and that the federal foreclosure action was therefore barred by the doctrine of res judicata. *Id.*

II. Standards of Review

We review de novo the circuit court's ruling on a motion for summary disposition, *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), and whether a court has personal jurisdiction over a party, *Oberlies v Searchmont Resort, Inc*, 246 Mich App 424, 426; 633 NW2d 408 (2001). Similarly, we review de novo issues of statutory interpretation and the proper interpretation and application of the court rules. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Peters v Gunnell, Inc*, 253 Mich App 211, 225; 655 NW2d 582 (2002). Finally, we review de novo whether the law of the case doctrine applies, *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), whether a party has been denied due process, *York v Civil Service Comm*, 263 Mich App 694, 699; 689 NW2d 533 (2004), and all other questions of law, *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006).

III. Weber's Appeal

On appeal, Weber raises several claims of error and contends that Van Fossen's motion for summary disposition was improperly granted for several reasons. He first argues that the circuit court did not have jurisdiction over him following this Court's remand in *Kloian I* because the circuit court had previously dismissed him from the case and he was never properly reinstated as a party to the litigation. He also argues that he was never personally served with a copy of Van Fossen's motion for summary disposition, that Van Fossen's motion for summary disposition was prematurely decided, that this Court already ruled that his mortgage interest was an interest in real property, and that the circuit court erred by extinguishing his mortgage interest because Van Fossen had defaulted on his obligations under the land contract. Lastly, Weber argues that he was denied his right to due process of law when the circuit court extinguished his mortgage interest without affording him a meaningful opportunity to participate in the

proceedings on remand and that Van Fossen has acted in bad faith throughout the pendency of this litigation. We address these arguments in turn.

A. Weber's Status Following Remand and Personal Jurisdiction

Weber first argues that the circuit court did not have personal jurisdiction over him following this Court's remand in *Kloian I* because the circuit court had previously dismissed him from the case and he was never properly reinstated as a party. He asserts that it was necessary for Van Fossen to file new pleadings against him and for the circuit court to reestablish jurisdiction over his person following remand by this Court. We disagree.

We first note the disingenuous nature of Weber's argument in this regard. It is true that the circuit court had earlier dismissed Weber from the case after determining that Van Fossen's motion for leave to file the third-party complaint had been improvidently granted. But Weber, himself, thereafter asked this Court to allow him to rejoin the litigation and to intervene in the circuit court proceedings. After hearing Weber's arguments, this Court in *Kloian I* remanded the matter to the circuit court with instructions to allow Weber to intervene. Once a party is permitted to intervene in an action, he or she becomes a party and is bound by all judgments rendered in the action. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 307; 561 NW2d 488 (1997); *Eyde v Meridian Charter Twp*, 118 Mich App 43, 50; 324 NW2d 775 (1982). Further, this Court has the authority to "allow substitution, addition, or deletion of parties . . . ." MCR 7.216(A)(2). Having specifically sought and obtained from this Court permission to intervene in the circuit court on remand, Weber may not now argue that he was not a party to the proceedings following remand to that court. See *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005) (observing that an appellant "may not harbor error, to which he or she consented, as an appellate parachute"); *Joba Construction Co, Inc v Burns & Roe Inc*, 121 Mich App 615, 629; 329 NW2d 760 (1982) (noting that a party who requests and obtains favorable relief is estopped from later assigning as error the fact that the requested relief was granted). Because this Court had already added Weber as an intervening party, see MCR 7.216(A)(2), we reject his claim that Van Fossen was required to take additional affirmative steps to make him a party to the litigation following remand to the circuit court.

With respect to the issue of personal jurisdiction, Weber argues that he has never consented to jurisdiction and that the circuit court therefore lacked general jurisdiction over his person pursuant to MCL 600.701. Pursuant to MCL 600.701(3), a Michigan court may exercise general personal jurisdiction over a party who consents thereto. A party's consent to the exercise of general personal jurisdiction under MCL 600.701(3) need not be express, but may be implied. *Unistrut Corp v Baldwin*, 815 F Supp 1025, 1027 (ED Mich, 1993); see also *Burger King Corp v Rudzewicz*, 471 US 462, 472 n 14; 105 S Ct 2174; 85 L Ed 2d 528 (1985). We conclude that when Weber specifically asked this Court to add him to the circuit court litigation as an intervening party, he implicitly consented to the circuit court's exercise of jurisdiction over his person on remand. See MCL 600.701(3).

Moreover, even if Weber had not consented to the circuit court's exercise of personal jurisdiction, he has conceded in his brief on appeal that "his business dealings in Michigan create the basis for jurisdiction . . . ." Pursuant to MCL 600.705(1), Michigan courts may exercise limited personal jurisdiction over individuals who engage in "[t]he transaction of any business within this state," and may "render personal judgments against the individual or his

representative arising out of an act" that gives rise to the exercise of limited personal jurisdiction. Weber transacted business within this state when he entered into his agreement with Kloian and took a mortgage in Kloian's interest as a land contract vendor. Therefore, even if the circuit court did not have general personal jurisdiction over Weber, we conclude that the circuit court possessed limited personal jurisdiction over Weber and was authorized to render a judgment against him with respect to his mortgage agreement with Kloian and his interest in the property and land contract. See MCL 600.705(1).

B. Van Fossen's Motion for Summary Disposition

Weber next argues that he was never properly served with a copy of Van Fossen's motion for summary disposition and that the circuit court prematurely considered Van Fossen's motion for summary disposition fewer than 28 days after it was served. Again, we disagree.

1. Service of Van Fossen's Motion

Although the amended proof of service contained in the lower court file is regular on its face and indicates that Van Fossen's motion for summary disposition was sent to Weber at "9416 Gold Mountain Drive, Las Vegas, NV 89134-7800" via first-class mail on April 21, 2008, Weber argues that he never received a copy of the motion at his Nevada address. Indeed, Weber filed an affidavit in the circuit court averring that he had never received a copy of the motion.

It is undisputed that attorneys Matecun and Davis were served with copies of Van Fossen's motion for summary disposition via first-class mail on April 15, 2008. But Weber argues that service on these attorneys was insufficient to apprise him of the motion for summary disposition because, under 2.107(B)(1)(c), "[a]fter a final judgment has been entered and the time for an appeal of right has passed, papers *must be served on the party* . . . ." (Emphasis added.) The problem with Weber's argument in this regard is that this Court in *Kloian I* had only just added him to the matter as an intervening party, specifically directing the circuit court to allow him to be heard on remand. Therefore, at least with respect to Weber's interests in the litigation, it can hardly be said that "final judgment ha[d] been entered and the time for an appeal of right ha[d] passed" within the meaning of MCL 2.107(B)(1)(c).

At any rate, even assuming arguendo that service on Matecun and Davis was somehow insufficient, we are unpersuaded by Weber's argument that he was not properly served in his personal capacity. We note that a document or paper, including a motion, may be served on a party "by mailing to the party at the address stated in the party's pleadings," MCR 2.107(C),[11] and that "[m]ailing a copy under this rule means enclosing it in a sealed envelope with first class postage fully prepaid, addressed to the person to be served, and depositing the envelope and its contents in the United States mail," MCL 2.107(C)(3). "Service by mail is complete at the time of mailing." *Id*. We accordingly reject Weber's veiled suggestion that Van Fossen was required

[11] Weber's pleadings filed with this Court in *Kloian I* indicated that his address was "9416 Gold Mountain Drive, Las Vegas, NV 89134." Weber also testified in an earlier deposition that this was his address of record.

to serve his motion for summary disposition via certified or registered mail, or that Van Fossen should have applied to the circuit court to obtain substituted service. As MCL 2.107(C)(3) makes clear, sending a copy of a motion to a party by first-class mail at that party's last-known mailing address is entirely sufficient to properly effect service on that party.

We also reject Weber's argument that he was never served with a copy of the motion at his Nevada address. We reiterate that the amended proof of service contained in the lower court file is regular on its face and indicates that Van Fossen's motion for summary disposition was sent to Weber at "9416 Gold Mountain Drive, Las Vegas, NV 89134-7800" via first-class mail on April 21, 2008. A proof of service that is regular on its face creates a rebuttable presumption of proper service, see *Garey v Morley Bros*, 234 Mich 675, 676-677; 209 NW 116 (1926), and "[t]he quantum of evidence required . . . to overthrow proof of service regular on its face is considerable," *Delph v Smith*, 354 Mich 12, 16; 91 NW2d 854 (1958). This Court has observed that "[t]he burden of proof to show non-service is upon the party attacking the jurisdiction of the court" and that the "mere denial of such service by that party is insufficient." *James v James*, 57 Mich App 452, 454; 225 NW2d 804 (1975). The evidence required to impeach an otherwise-regular proof of service must be unequivocal, clear, and convincing, *Garey*, 234 Mich at 678, and an individual's denial of service must be accompanied by "substantial corroboration" in order to overcome the presumption of proper service, *Alpena Nat'l Bank v Hoey*, 281 Mich 307, 312-313; 274 NW 803 (1937). The bare testimony of the individual attacking the court's jurisdiction is generally insufficient to impeach an otherwise-regular proof of service. See *Garey*, 234 Mich at 677; *James*, 57 Mich App at 454.

The only evidence tending to impeach the validity of the amended proof of service in the instant case is Weber's bare denial of service in his affidavit. Such a conclusory and uncorroborated denial is quite simply insufficient to impeach the otherwise-regular amended proof of service filed by Van Fossen. *Id*. We perceive no clear and convincing evidence sufficient to overcome the presumption that Weber was properly served with a copy of Van Fossen's motion for summary disposition at his Nevada address.

2. Timeliness of the Circuit Court's Hearing

Weber also argues that even if he was properly served with Van Fossen's motion for summary disposition at his Nevada address, the motion was prematurely considered fewer than 28 days after it was served, in violation of MCR 2.116(B)(2). Specifically, Weber points out that although Van Fossen's motion for summary disposition was allegedly served on him on April 21, 2008, the motion was heard by the circuit court on May 14, 2008, fewer than 28 days later.

MCR 2.116(B)(2) provides that a "hearing on a motion [for summary disposition] brought by a party asserting a claim shall not take place until at least 28 days after the opposing party was served with the pleading stating the claim." Quite clearly, the language of MCR 2.116(B)(2) does not refer to service of the motion for summary disposition itself, but rather to service of the original "pleading stating the claim." The substance of Weber's argument appears to be that because he never received the original pleadings in this matter, Van Fossen's motion should not have been heard until at least 28 days after *the motion* was served on him.

Weber's specific reading of the court rule does not persuade us, and we question whether the timing requirements of MCR 2.116(B)(2) even apply in the context of an intervening party

who has intervened long after the filing and service of the original pleadings. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 392; 651 NW2d 756 (2002) (observing that MCR 2.116(B)(2) applies only to "'plaintiffs who wish to move for immediate summary disposition upon the filing of a complaint'"). But even assuming arguendo that the timing requirements of MCR 2.116(B)(2) do apply in situations such as this, we conclude that Weber was not prejudiced by the circuit court's consideration of the motion for summary disposition on May 14, 2008. It is well settled that procedural defects are generally subject to the harmless error rule. See, e.g., *In re Utrera*, 281 Mich App 1, 14; 761 NW2d 253 (2008); *Detroit v Volunteers of America*, 169 Mich App 465, 472-473; 426 NW2d 743 (1988); see also MCR 2.613(A). After reviewing the record in this case, we are satisfied that any failure to satisfy the 28-day requirement of MCR 2.116(B)(2) was harmless and not prejudicial to Weber's interests. Both Matecun and Davis were served with copies of the motion for summary disposition more than 28 days before the circuit court's hearing of May 14, 2008, and Weber was actually represented at the hearing by attorney Tanner. Accordingly, Weber cannot now claim that he did not have actual notice of the scheduled hearing or of the pendency of the motion. Moreover, Weber was provided with a full opportunity to move for reconsideration following the circuit court's ruling on the motion for summary disposition. See *Boulton v Fenton Twp*, 272 Mich App 456, 463-464; 726 NW2d 733 (2006). In sum, Weber has not demonstrated that he was prejudiced by any failure to comply with the 28-day requirement of MCR 2.116(B)(2), and we will not presume prejudice merely from the fact that the circuit court's hearing may have been held fewer than 28 days after the motion was served on Weber in Nevada. We will not disturb the circuit court's decision solely on the basis of this alleged violation of MCR 2.116(B)(2), which was plainly harmless if it was even error at all.

Finally, and contrary to Weber's argument on appeal, we note that the circuit court *did* comply with the timing requirements of MCR 2.116(G)(1)(a)(*i*), the rule that actually governs the amount of time that must elapse between the service of a motion for summary disposition and the circuit court's hearing. Pursuant to MCR 2.116(G)(1)(a)(*i*), unless a different period is set by the court, a motion for summary disposition "must be filed and served at least 21 days before the time set for the hearing . . . ." In this case, it is undisputed that the circuit court's hearing on Van Fossen's motion for summary disposition was held on May 14, 2008, more than 21 days after the motion was served on Weber via first-class mail on April 21, 2008. Therefore, the circuit court fully complied with the requirements of MCR 2.116(G)(1)(a)(*i*) in this case. See *Yee*, 251 Mich App at 392.

C. This Court's Previous Opinion in *Kloian I*

Weber argues that this Court already ruled in *Kloian I* that his mortgage interest was an interest in real property, and that this is now the law of the case. He also argues that the circuit court erred by extinguishing his mortgage interest because Van Fossen had defaulted on his obligations under the land contract. We cannot agree with Weber's arguments in this regard.

We first consider Weber's argument that the *Kloian I* Court already determined that he had a real estate mortgage interest in the property and that such a determination is now law of the case. Weber's assertion in this regard is disingenuous and clearly incorrect. A careful reading of the opinion in *Kloian I* reveals that this Court reserved judgment concerning the exact nature of Weber's interest in the property, choosing instead to remand to the circuit court for an initial determination of the type of interest held by Weber. It is true that this Court's opinion in

Kloian I states, "Additionally, Van Fossen's argument that Weber is not a mortgagee in the real property is frivolous because Van Fossen admitted below that Weber owned the mortgage." *Kloian I*, slip op at 14. But contrary to Weber's assertion, this sentence was not part of the Court's holding. Instead, it was merely a recitation of one of the arguments that Weber had raised in that appeal. The question whether Weber's interest was a true real estate mortgage or merely a security interest in Kloian's personalty was never even considered in *Kloian I*.

Weber also argues that the circuit court erred by extinguishing his mortgage interest because Van Fossen had defaulted on his obligations under the land contract. Weber is essentially attempting to relitigate his previous assertion that because Van Fossen defaulted on the land contract, Van Fossen's interest in the property was no longer superior to Weber's own interest. But the law of the case doctrine bars this argument. This Court in *Kloian I* specifically affirmed the circuit court's ruling that Van Fossen had *not* defaulted on the land contract, and had fully performed his obligations thereunder. *Id*. at 2-12. Under the law of the case doctrine, "'a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.'" *Sinicropi v Mazurek*, 279 Mich App 455, 465; 760 NW2d 520 (2008), quoting *Ashker*, 245 Mich App at 13. Weber may not again argue that Van Fossen defaulted on his obligations under the land contract because this issue has already been decided adversely to him in this litigation.

D. Due Process

Weber further argues that he was denied his right to due process of law when the circuit court extinguished his mortgage interest without affording him a meaningful opportunity to participate in the proceedings on remand. Again, we disagree. Weber did receive a meaningful opportunity to participate in the circuit court proceedings on remand, just as this Court directed in *Kloian I*. Weber was notified of both the circuit court's status conference and the circuit court's motion hearing. He was served with a copy of Van Fossen's motion for summary disposition. So, too, were his attorneys Matecun and Davis served with copies of the motion. Although neither Matecun nor Davis appeared for the motion hearing, another lawyer, attorney Tanner, represented Weber there. Davis filed a written response to Van Fossen's motion for summary disposition, in which he could have set forth Weber's substantive arguments but instead chose not to do so.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950); see also *Dow v Michigan*, 396 Mich 192, 205-206; 240 NW2d 450 (1976). Here, Weber and his attorneys did have sufficient notice of the pendency of Van Fossen's motion and the scheduled circuit court proceedings. Moreover, as demonstrated by Davis's written response to the motion and attorney Tanner's presence at the motion hearing, Weber received an ample opportunity to be heard on remand as directed by this Court in *Kloian I*. He simply chose, for whatever reason, not to participate in the proceedings. A party's decision not to exercise his or her opportunity to be heard does not equate to a deprivation of due process. See *Loyd v Loyd*, 731 F2d 393, 400 (CA 7, 1984); see also *In re Elizabeth T*, 3 AD3d 751, 753; 770 NYS2d 804 (NY App, 2004) (observing that the court "did not deprive respondent of due process" when the

respondent "simply chose not to participate in the process"). We perceive no error requiring reversal in this regard.

E. Van Fossen's Alleged Bad-Faith Conduct

Finally, Weber argues that he is entitled to appellate relief because Van Fossen has acted in bad faith throughout this litigation. Specifically, he contends that Van Fossen has taken a number of "inconsistent" and "contradictory" positions, both before the circuit court and this Court. By contrast, Weber asserts that he "has always maintained the same position."

Although Weber asserts in his brief on appeal that Van Fossen has taken a number of "inconsistent" and "contradictory" positions, he fails to specify exactly which inconsistencies and contradictions form the basis of his argument. Furthermore, he fails to identify the nature of the relief to which he believes he is entitled as a result of Van Fossen's alleged bad-faith conduct. It is axiomatic that an appellant may not simply announce his position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Nor may he leave it to this Court to unravel his arguments and then search for authority to sustain or reject his position. *Id*. Weber's cursory briefing of this argument without proper citation to supporting authority constitutes abandonment of the issue on appeal. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003).

At any rate, as we understand his terse argument, Weber is essentially arguing that Van Fossen has acted with unclean hands. Whatever truth there may be in Weber's assertions concerning Van Fossen, we note that Weber, himself, has also taken "inconsistent" and "contradictory" positions in this litigation. Most notably, although Weber specifically asked this Court in *Kloian I* to permit him to intervene in the circuit court, he now argues that he was never made a party to the circuit court proceedings and that the circuit court lacked jurisdiction over him on remand. Further, even though it is clear that Weber had actual notice of Van Fossen's motion for summary disposition and the scheduled motion hearing, he disingenuously contends that he was completely unaware of the pending motion following remand to the circuit court. It is well settled that a party who seeks equitable relief must do so with clean hands. *McCluskey v Winisky*, 373 Mich 315, 321; 129 NW2d 400 (1964); *Berar Enterprises, Inc v Harmon*, 101 Mich App 216, 231; 300 NW2d 519 (1980). A party with unclean hands may not defend on the ground that the other party has unclean hands as well. To permit a party with unclean hands to defend on such a ground would contravene the ancient rule that "[h]e who hath committed iniquity shall not have equity." *Society of Good Neighbors v Van Antwerp*, 324 Mich 22, 28; 36 NW2d 308 (1949); see also *McCredie v Buxton*, 31 Mich 383, 388 (1875). Weber is entitled to no relief on this ground.

IV. Kloian's Cross Appeal

On cross appeal, Kloian raises several claims of error as well. Kloian argues that the circuit court erred by granting Van Fossen's motion for summary disposition and that, at a minimum, the motion for summary disposition was prematurely decided. He also argues that the circuit court denied him due process of law by refusing to allow him to participate in the March 2008 status conference and the motion hearing of May 14, 2008. Lastly, Kloian asserts that Van

Fossen has "continued [a] pattern of advancing 'frivolous' legal arguments" and that this matter should be remanded to a different circuit judge. We address these arguments seriatim.

A. Van Fossen's Motion for Summary Disposition

Kloian argues that the circuit court prematurely considered Van Fossen's motion for summary disposition, that he was "severely prejudiced" by this premature consideration because it left him insufficient time to find a new lawyer, and that because there were no "pleadings" the circuit court was without authority to grant summary disposition. He also argues that the circuit court erred as a matter of law by determining that Weber's mortgage interest was not an interest in real estate. We agree in part and disagree in part. Nonetheless, we find that Kloian is entitled to no relief because the circuit court reached the correct result, albeit for the wrong reason.

1. Timeliness of the Circuit Court's Hearing and Possible Prejudice

Like Weber, Kloian also contends that Van Fossen's motion for summary disposition was prematurely considered by the circuit court. Kloian points out that although Van Fossen's motion for summary disposition was served on him on April 15, 2008, the circuit court considered the motion on May 14, 2008. Kloian complains that he was prejudiced by the circuit court's consideration of the motion on May 14, 2008, because it did not afford him "adequate time . . . to find new trial court counsel."

For the reasons stated previously, we question whether the 28-day requirement of MCR 2.116(B)(2) would even apply in this context. But even assuming arguendo that the rule would apply here, we conclude that it was fully satisfied with respect to Kloian. Unlike Weber, who was served with Van Fossen's motion for summary disposition on April 21, 2008, Kloian and his former attorney were served six days earlier, on April 15, 2008. Accordingly, the circuit court's hearing on May 14, 2008, occurred "at least 28 days" after Kloian was served. MCR 2.116(B)(2). Moreover, despite Kloian's assertion to the contrary, the circuit court *did* comply with the timing requirements of MCR 2.116(G)(1)(a)(*i*) in this case. It is beyond dispute that the circuit court's hearing on Van Fossen's motion for summary disposition was held more than 21 days after the motion was served on Kloian. MCR 2.116(G)(1)(a)(*i*).

Kloian also argues that he was "severely prejudiced" by the circuit court's consideration of Van Fossen's motion for summary disposition on May 14, 2008, because the timing of the court's hearing did not leave him enough time to locate new counsel. However, Kloian does not explain how the one-month period between April 15, 2008, and May 14, 2008, was not sufficient time to find a new lawyer. We note that Kloian has been represented by many different attorneys throughout the pendency of this litigation, and has had no apparent difficulty in hiring or retaining counsel in the past. As Kloian has provided no examples of how he was prejudiced or why the one-month period was insufficient in this instance, he is entitled to no appellate relief. We will not presume prejudice in the absence of specific evidence that Kloian was actually harmed.

Lastly, relying on MCR 2.116(G)(5), Kloian claims that because there were no "pleadings" the circuit court was without authority to grant Van Fossen's motion for summary disposition. But Kloian's bald assertion in this regard is entirely devoid of supporting argument. Moreover, this assertion of error was not included in Kloian's statement of the questions

presented, in violation of MCR 7.212(C)(5). Accordingly, the matter is not properly before us, and we decline to consider it further. *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007); *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).[12]

2. The Nature of Weber's Interest

As noted earlier, the circuit court found that because Kloian's land contract vendor's interest was an interest in personalty, Weber took only a security interest in Kloian's personalty rather than a true mortgage interest in the real property. In Michigan, mortgages of land contract vendor's interests and land contract vendee's interests are now governed by the comprehensive land contract mortgage act, MCL 565.356 *et seq*. See *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 616 n 6; 677 NW2d 829 (2004). However, the land contract mortgage act was not enacted until 1998, see 1998 PA 106, and therefore does not apply to the mortgage agreement between Kloian and Weber in this case, which was executed in January 1997.[13] Instead, the mortgage agreement between Kloian and Weber must be evaluated under the common law of land contracts and mortgages. It is to this common law that we now turn to evaluate the propriety of the circuit court's ruling.

As this Court observed in *Pittsfield Charter Twp v Saline*, 103 Mich App 99, 103; 302 NW2d 608 (1981) (citation omitted):

> "A contract for the sale of land operates as an equitable conversion; the vendee's interest under the contract becomes realty and the vendor's interest under the contract constitutes personalty. In equity the purchaser is regarded as the owner subject to liability for the unpaid price and the vendor as holding the legal title in trust for him from the time a valid agreement for the purchase of land is entered into. . . . Thus, as a vendee makes payments on a land contract the vendor becomes trustee for him of the legal estate, and he becomes in equity the owner of the land to the extent of payments made. A contract for the sale of land, part of the purchase price being paid and possession taken, vests in the vendee an

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[12] Nor is Kloian's cursory assertion concerning service on his guardian ad litem contained in his statement of the questions presented. We therefore decline to address it. MCR 7.212(C)(5); *Ypsilanti Fire Marshal*, 273 Mich App at 553.

[13] The general rule in this state is that "'statutes are presumed to operate prospectively unless the contrary intent is clearly manifested.'" *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation omitted); see also *Detroit Trust Co v Detroit*, 269 Mich 81, 84-85; 256 NW 811 (1934). We perceive nothing in the text of the land contract mortgage act to indicate that the Legislature intended the act to apply retroactively. See *People v Nuss*, 405 Mich 437, 450; 276 NW2d 448 (1979). But we also reject Kloian's suggestion that the circuit court impermissibly gave retroactive effect to the land contract mortgage act. The circuit court never even mentioned the land contract mortgage act, and it is clear from the record that the act played no part in the circuit court's ruling.

> equitable title in fee. The vendor is a trustee of the legal title for the vendee to the extent of his payment."

Accordingly, under the doctrine of equitable conversion, the vendor's interest in a land contract is generally considered to be personalty from the time the land contract is executed. *Brooks v Gillow*, 352 Mich 189, 193; 89 NW2d 457 (1958); *In re Handelsman*, 266 Mich App 433, 440; 702 NW2d 641 (2005).

However, the doctrine of equitable conversion—a legal fiction—is not an absolute rule. See *Brooks*, 352 Mich at 193-195. For example, the doctrine of equitable conversion will not be applied when it would work a fraud, *id*. at 193, when it would defeat the true intentions of the parties, *Detroit & Security Trust Co v Kramer*, 247 Mich 468, 471; 226 NW 234 (1929), or when it would "accomplish a decidedly inequitable result," *Union Guardian Trust Co v Rood*, 261 Mich 188, 192; 246 NW 74 (1933). Our Supreme Court has noted that "[c]ourts should not adopt the doctrine of equitable conversion or any other equitable or legal fiction where doing so would unsettle or render uncertain valuable property rights." *Id*. at 193.

Thus, notwithstanding the doctrine of equitable conversion, the vendor's interest in a land contract was clearly mortgageable at common law. *Union Guardian Trust Co v Rood (On Rehearing)*, 265 Mich 354, 354-355; 251 NW 309 (1933); see also *Kramer*, 247 Mich at 472 (noting that if the vendors of real property had granted a mortgage after execution of the contract, "it would hardly be contended that it was a chattel mortgage, because it covered only the interest of the vendors which had become personal property under the doctrine of equitable conversion"). Moreover, the general common-law rule was that the land contract vendor's mortgagee held his security interest in realty rather than in personalty, and that his mortgage was therefore "foreclose[able] as a real estate mortgage rather than as a chattel mortgage." *Rood*, 265 Mich at 355; see also Nelson & Whitman, Real Estate Finance Law (4th ed), § 3.37, pp 115-116.

Based on this authority, we must conclude that the circuit court erred by ruling as a matter of law that Weber took only a mortgage in Kloian's personalty and could not have taken a mortgage in the real property. As shown by the mortgage documents executed in this case, it was clearly the parties' intent that Weber would take a mortgage in the real property rather than merely in Kloian's personalty. We conclude that Weber held his mortgage in the real property, and that his mortgage was therefore "foreclose[able] as a real estate mortgage rather than as a chattel mortgage." *Rood*, 265 Mich at 355. It was error for the circuit court to apply the doctrine of equitable conversion to defeat the parties' true intentions. See *Kramer*, 247 Mich at 471.

Nevertheless, we conclude that the circuit court reached the correct result in this case, albeit for an incorrect reason. Although a mortgage given by a land contract vendor has historically been considered an interest in the real estate, Nelson & Whitman, Real Estate Finance Law (4th ed), § 3.37, pp 115-116, the majority rule at common law was that such a mortgage encumbered the land *only* to the extent of the vendee's remaining indebtedness for the unpaid portion of the purchase price, 92A CJS, Vendor & Purchaser, § 470, p 57 (stating that "[a]n assignment by the vendor of a contract for the sale of land, for security, vests in the assignee a lien on the vendor's interest in the property to the extent of the debt secured, not exceeding the purchase money unpaid on the contract"); see also *Flyge v Flynn*, 63 Nev 201, 225-226; 166 P2d 539 (1946), and *Marion Mortgage Co v Grennan*, 106 Fla 913, 925; 143 So 761 (1932). In light of this authority, it necessarily follows that once the vendee has paid off the

entire purchase price remaining due under the land contract, the vendee is entitled to receive a deed from the vendor free of the mortgage, and the mortgage held by the vendor's mortgagee is extinguished. See *In re Vandenbosch*, 405 BR 253, 263 (Bkrtcy WD Mich, 2009) (noting that "once all payments under the contract have been made, and all that is left for the vendor to do under the [land] contract is to convey legal title to the purchaser, any rationale for permitting a lien to attach to the vendor's interest no longer exists"); *Wyllie v Von Ruden*, 76 Or App 598, 602; 711 P2d 137 (1985) (observing, in the context of a judgment lien rather than a mortgage, that upon the land contract vendees' payment of the full purchase price to the land contract vendor, the "judgment lien on the vendor's interest in th[e] property was extinguished").

As explained earlier, the circuit court previously determined that Kloian owed Van Fossen $2,173,361.97, but that Kloian was entitled to a setoff in the amount of $494,946.32, which represented the total amount that remained due and owing on the land contract. After deducting this remaining amount due under the original land contract from the total amount due to Van Fossen, the court determined that Van Fossen had "satisfied all obligations under the Land Contract," and transferred the property to Van Fossen "free and clear." Thereafter, this Court affirmed the circuit court's ruling that Van Fossen had satisfied all remaining obligations under the land contract in *Kloian I*. In other words, because Van Fossen had satisfied the remaining amount due under the original land contract in full, there was no longer any remaining indebtedness on the original purchase price. See 92A CJS, Vendor & Purchaser, § 470, p 57. Thus, Van Fossen was entitled to receive legal title from Kloian, and Weber's mortgage on Kloian's land contract vendor's interest was extinguished.

In sum, although the circuit court did so for incorrect reasons, it reached the correct result when it determined that Weber held no mortgage interest in the real estate. It is axiomatic that this Court will not reverse when the circuit court has reached the correct result, even if it has done so for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006); *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000).[14]

B. Due Process

Kloian next argues that the circuit court denied him due process of law by refusing to allow him to participate in the March 2008 status conference and the motion hearing of May 14, 2008. The court reasoned that because Kloian's interests had been fully and finally decided in that portion of the previous circuit court judgment that was affirmed on appeal in *Kloian I*, there was no need to allow Kloian to be heard on remand.

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[14] Like Weber, Kloian also argues that this Court already ruled in *Kloian I* that Weber's mortgage interest was an interest in real estate rather than an interest in personalty. We reject Kloian's argument in this regard for the reasons stated above in Part III(C). When the *Kloian I* Court stated that "Van Fossen's argument that Weber is not a mortgagee in the real property is frivolous," the Court was merely summarizing one of Weber's arguments on appeal. The question whether Weber's interest was a true real estate mortgage was never even considered in *Kloian I*.

It is true that all of Kloian's *direct* arguments had been previously considered and decided. However, it strikes us that Kloian should have been permitted to participate in the proceedings on remand, at least to some degree. As noted earlier, due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 US at 314; see also *Dow*, 396 Mich at 205-206. Indeed, the final determination of the nature of Weber's mortgage interest was surely a question in which Kloian was at least minimally interested. After all, any determination that Weber's interest was not a real estate mortgage could have financially impacted Kloian by shutting off Weber's recourse against the real property and potentially leaving Kloian personally responsible on the note.

However, we conclude that any error committed by the circuit court in this regard was not prejudicial and did not affect the outcome. To obtain relief on a procedural due process claim, an individual must generally show that some material prejudice has resulted from the alleged violation. See *Dep't of Transportation v Brown*, 153 Mich App 773, 784; 396 NW2d 529 (1986). The determination of the nature of Weber's interest essentially presented a question of law for the court, and although it turns out that the circuit court incorrectly analyzed this question of law, any factual arguments made by Kloian would have been largely irrelevant on this issue. As noted above, the common-law rule is that a land contract vendor's mortgagee holds his mortgage interest in realty rather than in personalty, and that his mortgage is "foreclose[able] as a real estate mortgage rather than as a chattel mortgage." *Rood*, 265 Mich at 355. Kloian could not have presented any arguments or offered any evidence that would have negated or altered the effect of this rule in the present case. For these reasons, he cannot show that he was prejudiced by the circuit court's refusal to allow him to participate in the status conference and motion hearing. Moreover, particularly in light of our agreement with Kloian that Weber held his mortgage interest in realty rather than in personalty, it cannot be disputed that the circuit court's refusal to allow Kloian's participation has not affected the outcome of this case. It is well settled that we will not reverse on the basis of error that was not decisive to the outcome. *Ypsilanti Fire Marshal*, 273 Mich App at 529.

C. Van Fossen's Allegedly "Frivolous" Arguments

Kloian also implies that he is somehow entitled to appellate relief because Van Fossen has allegedly "continued [a] pattern of advancing 'frivolous' legal arguments" throughout this litigation. In fact, he claims that the *Kloian I* Court already labeled "Van Fossen and his attorney's legal arguments 'frivolous.'" Nothing could be further from the truth. Contrary to Kloian's suggestion, this Court has never characterized Van Fossen's arguments as "frivolous." We acknowledge that the opinion in *Kloian I* contained language stating that "Van Fossen's argument that Weber is not a mortgagee in the real property is frivolous . . . ." But Kloian is reading this phrase entirely out of context. As explained above, the *Kloian I* Court was merely summarizing one of Weber's arguments. It certainly was not passing judgment on the quality or nature of Van Fossen's arguments. Beyond this, Kloian does not specify which of Van Fossen's arguments were "frivolous" or why his allegations in this regard should entitle him to any appellate relief. Kloian may not simply announce his position and leave it to this Court to discover and rationalize the basis for his claim of error. *Mudge*, 458 Mich at 105. This issue has been abandoned. *Peterson Novelties*, 259 Mich App at 14.

D. Remand to a Different Circuit Judge

Because we affirm the circuit court in all respects, it is unnecessary to consider Kloian's argument that this matter should be remanded to a different circuit judge.

V. Conclusion

Although the circuit court relied on incorrect reasoning, it reached the correct result by granting Van Fossen's motion for summary disposition and determining that Weber held no mortgage interest in the real property.

In light of our conclusions above, we need not consider the remaining arguments raised by the parties on appeal.

Affirmed. As the prevailing party, Van Fossen may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra