

STATE OF MICHIGAN
COURT OF APPEALS

GREAT OAKS REAL ESTATE, LLC,

Plaintiff/Counter-Defendant-
Appellee,

v

PERMADAY LIMITED PARTNERSHIP,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

April 13, 2010

No. 288075

Oakland Circuit Court

LC No. 2007-085450-CK

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In this case arising out of judicial foreclosure of a land contract, defendant/counter-plaintiff Permaday Limited Partnership appeals as of right the trial court's orders granting plaintiff/counter-defendant Great Oaks Real Estate, LLC, summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

On March 29, 2007, Great Oaks, as owner in fee simple, entered into a land contract with Lookwell Limited Partnership to sell a certain parcel of property to Lookwell for \$400,000. At the time the land contract was executed, real property taxes on the property were due to the Oakland County Treasurer for the years 1999-2006, in the approximate amount of \$187,000. Pursuant to paragraph 6 of the land contract, the parties agreed that Great Oaks would pay the outstanding real property taxes through the 2006 tax year and that Lookwell was thereafter responsible for paying the real property taxes, beginning with the 2007 tax year. However, the property was subject to foreclosure, such that, if the outstanding property taxes were not paid, or a payment plan was not agreed to with the Oakland County Treasurer, then the property would be foreclosed as of April 2, 2007. Great Oaks saved the property from immediate foreclosure by negotiating payment terms with the Oakland County Treasurer. And Great Oaks began to pay the real property taxes as required by its agreement with the Oakland County Treasurer. Indeed, in March 2007, Great Oaks paid \$66,500 to the Oakland County Treasurer.

On April 27, 2007, Lookwell assigned its vendee interest in the land contract to Permaday. By the terms of the assignment, Permaday agreed to be bound by the terms of the land contract. And although Permaday made its first two \$5,987.54 monthly payments in May and June 2007, it failed to make any further payments. Accordingly, Great Oaks tendered an

acceleration and default notice to Permaday on August 15, 2007. However, Permaday failed to cure the defect. So on August 29, 2007, Great Oaks filed a complaint against Permaday for judicial foreclosure of the land contract, alleging that Permaday breached the land contract by not making the requisite monthly payments. Permaday responded to the complaint, asserting, inter alia, the affirmative defense that Great Oaks had breached paragraph 6 of the land contract.

In October 2007, Permaday filed a counter-complaint, alleging that Great Oaks breached the land contract by failing to pay “the majority” of the 1996-2006 real property taxes and that Permaday suffered damages as a result. Permaday also sought an order of specific performance, requiring Great Oaks to pay the unpaid portion of the taxes. Great Oaks responded to the complaint, asserting, inter alia, the affirmative defense that, pursuant to its agreement with the Oakland County Treasurer, Great Oaks had until April 2008 to bring the taxes current.

In November 2007, Permaday filed an amended counter-complaint, adding a claim of fraudulent inducement. According to Permaday, Great Oaks misrepresented to Permaday that Great Oaks would pay all the real property taxes on or before April 2, 2007. Permaday alleged that it relied on that representation and that it suffered damages as a result. Great Oaks reasserted its affirmative defenses.

In November 2007 and January 2008, Permaday made three payments, totaling \$47,719.08 in real property taxes to the Oakland County Treasurer. Great Oaks applied those payments to the balance Permaday owed, but a deficiency still remained.

In April 2008, Great Oaks moved for summary disposition under MCR 2.116(C)(9) and (C)(10) on the counts in its complaint. Great Oaks argued that Permaday failed to state a valid defense because the land contract did not state a specific time for the real property taxes to be paid and that there was no genuine issue of material fact that Permaday breached the land contract by failing to make its monthly payments. Great Oaks further noted that it had “most recently” made two more payments to the Oakland County Treasurer (\$78,500 on March 31, 2008, and \$15,099.97 on April 7, 2008), and that the balance of the outstanding taxes was now paid. Permaday responded, conceding that the land contract did not specify a time for the taxes to be paid. However, Permaday argued that in the absence of an explicit deadline, the time for performance of the contract requirement was presumed to be a reasonable time, and because what constituted a “reasonable time” was a factual question, summary disposition was inappropriate.

The trial court found that Permaday breached the land contract by failing to make the required monthly payments to Great Oaks. And, with respect to Permaday’s argument regarding Great Oaks failure to pay the taxes, the trial court agreed with Great Oaks that Permaday “suffered no damages due to the agreement between [Great Oaks] and the Oakland County Treasurer to make the tax payments over a 12 month period.” The trial court added that Permaday’s “interest in the property has been preserved and [Great Oaks] has paid all the past due taxes or has credited [Permaday] with the amounts paid to . . . Oakland County Treasurer directly” Accordingly, the trial court granted Great Oaks’ motion for summary disposition on its complaint and entered a judgment of foreclosure.

On June 9, 2008, Permaday moved for leave to amend its counter-complaint. In light of the fact that the balance of the outstanding taxes had been paid, Permaday argued that its claim for specific performance should be amended and changed to a claim for reformation instead.

The trial court denied Permaday's motion for leave to amend its counter-complaint, stating, "It's simply too late for the filing of the Second Amended Complaint."

Great Oaks then moved for summary disposition under MCR 2.116(C)(10) on the counts in Permaday's counter-complaint. Great Oaks argued that it did not breach the land contract because there was no specified date on which the taxes were to be paid. Great Oaks further argued that it made no misrepresentations to Permaday to induce it to execute the land contract. And Great Oaks argued that Permaday's claim for specific performance was moot because Great Oaks paid the taxes and credited Permaday for the payments it had made.

Permaday responded, arguing that Great Oaks was required to pay the full amount of the outstanding real property taxes within a reasonable time. Permaday further argued that there were genuine issues of material fact regarding its fraudulent inducement claim. And Permaday requested that the trial court order such other relief as it deemed equitable, just, and proper. In support of its motion, Permaday filed an affidavit from its attorney Keith Mitani. Mitani averred that he also served as counsel to Lookwell during negotiations on the land contract. According to Mitani, the payment plan agreement between Great Oaks and the Oakland County Treasurer prevented development of the land because it was still subject to foreclosure until the full amount was paid. Also noting that the interest rate on the land contract was 17.875 percent, Mitani averred that Lookwell would never have agreed to the land contract terms if it had known that Great Oaks would not be able to pay the taxes by April 2, 2007.

The trial court granted Great Oaks' motion for summary disposition on Permaday's counter-complaint. The trial court found that Permaday's breach of contract claim must fail because the taxes had been paid in full. The trial court also found that Permaday's claim for specific performance was moot because the taxes had been paid. And the trial court further found that there was "no evidentiary support for the allegation that prior to the execution of the land contract, [Great Oaks] would pay the property taxes by April 2nd of 2007."

Permaday then moved to alter or amend the judgment and/or for leave to amend its counter-complaint. Permaday argued that Great Oaks' acceleration of the land contract was invalid because it had told Great Oaks on January 15, 2008 that it had paid \$47,719.08 for the taxes. Permaday argued that Great Oaks should have then discontinued the foreclosure proceedings and voluntarily dismissed its complaint because Permaday's outstanding account balance was then paid. (Permaday calculated that, as of January 15, 2008, its outstanding balance was \$46,104.03—seven missed payments of \$5,987.54, plus seven late charges of \$598.75.) Permaday also argued that the trial court should have granted it leave to amend its complaint because permitting an amendment was mandatory under MCR 2.116(I)(5), which states that "the court shall give the parties an opportunity to amend their pleadings" if summary disposition is asserted under MCR 2.116(C)(8), (9), or (10). Great Oaks responded, arguing that even if Permaday's \$47,719.08 payments were sufficient to bring current its past due monthly payments and late fees, Permaday was still in default for not paying the taxes owed beginning in 2007.

The trial court denied Permaday's motion to alter or amend the judgment and/or for leave to amend its counter-complaint on the ground that Permaday was essentially seeking reconsideration of the court's prior denial of Permaday's motion to amend.

Permaday now appeals.

II. MOTIONS FOR SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

MCR 2.116(C)(9) provides that a motion for summary disposition may be raised on the ground that the opposing party has failed to state a valid defense to the claim asserted against it. The motion tests the sufficiency of a defendant's pleadings alone, and all well-pleaded allegations are accepted as true.¹ Summary disposition is proper if the defenses are so clearly untenable as a matter of law that no factual development could possibly support a plaintiff's right to recovery.²

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.³ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁴

We review de novo the trial court's ruling on a motion for summary disposition.⁵

B. BREACH OF CONTRACT

1. OVERVIEW

Permaday essentially argues that the trial court erred in granting Great Oaks summary disposition on the complaint and counter-complaint because Great Oaks breached paragraph 6 of the land contract by not timely and fully paying the 1997 to 2006 real property taxes. More specifically, Permaday argues that Great Oaks was contractually required, but failed, to timely and fully pay the \$186,947.85 owed for the 1997 to 2006 taxes.

2. GREAT OAKS' COMPLAINT

In presenting its argument on appeal, Permaday does not differentiate between the two separate motions that Great Oaks brought for summary disposition. In so failing, Permaday also fails to offer any argument regarding the trial court's conclusion that there was no genuine issue

¹ *Allstate Ins Co v Morton*, 254 Mich App 418, 421; 657 NW2d 181 (2002); *Hazel Park v Potter*, 169 Mich App 714, 718; 426 NW2d 789 (1988).

² *Allstate Ins Co*, 254 Mich App 421.

³ MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁴ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

⁵ *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007); *Allstate Ins Co*, 254 Mich App 421.

of material fact that Permaday breached the contract by not making its monthly payments. Therefore, we conclude that Permaday has abandoned this issue.⁶

Regardless, we also conclude that summary disposition on the breach of contract issue in Great Oaks' complaint was indeed proper.

Paragraph 3 of the land contract states, in pertinent part:

The Purchase Price and interest will be paid in monthly installments of Five Thousand Nine Hundred Eighty-Seven and 54/100 Dollars (\$5,987.54) each, beginning on May 1, 2007 and continuing until the Purchase Price is paid in full, including principal and interest. All payments are to be applied first to attorney fees, taxes, insurance and other costs allowed under this Land Contract, including late fees, then to interest and the balance to principal.

Paragraph 9 of the land contract states, in pertinent part:

In addition to Purchaser's default of any other provisions in the Land Contract, any of the following shall constitute an "Event of Default" in the Land Contract by Purchaser:

- a. Failure to make any payment due under Section 3 herein[.]

And paragraph 10b of the land contract states:

If an Event of Default exists for a period of thirty (30) consecutive days or longer, Seller may declare the entire balance due on the principal and unpaid interest including any other sums paid by Seller immediately due and payable and may institute foreclosure proceedings pursuant to Michigan Law, including foreclosure by advertisement, if Seller so chooses on the Land Contract[.]

Here, there is no dispute that Permaday stopped making the required \$5,987.54 monthly payments after June 2007. Therefore, as of July 2007, Permaday was in default on the land contract and was in breach of the above-stated contract terms. Further, we find no merit to Permaday's argument to the extent that it argues that Great Oaks' alleged breach of contract was a valid defense. Even assuming *arguendo* that Great Oaks breached the land contract by not paying the taxes by April 2, 2007, such breach does not negate Permaday's requirement to fulfill its contract obligation to make its monthly payments.

Accordingly, summary disposition in favor of Great Oaks on the breach of contract claim in its complaint was proper where there was no genuine issue of material fact that Permaday failed to make its monthly payments pursuant to the land contract and it had no valid defense.

⁶ *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

3. PERMADAY'S COUNTER-COMPLAINT

Paragraph 6 of the land contract states: "Seller is responsible to pay \$186,947.85 for the 1997 to 2006 taxes. Purchaser is responsible for and shall timely pay any and all other taxes, assessments, charges, fines, and impositions attributable to the Property, where assessed prior to or after the date of this Land Contract." And paragraph 9 of the land contract states, in pertinent part:

In addition to Purchaser's default of any other provisions in the Land Contract, any of the following shall constitute an "Event of Default" in the Land Contract by Purchaser:

* * *

- b. Failure to make any payment due under Section 6 herein[.]

The trial court granted Great Oaks' motion for summary disposition on Permaday's counter-complaint, finding that Permaday's breach of contract claim must fail because the taxes had been paid in full. And on appeal, Permaday argues that the trial court erred because Great Oaks did not actually pay the entire \$186,947.85 amount. That is, Permaday argues that Great Oaks only paid \$160,099.97 (\$66,500 in March 2007; \$78,500 in March 2008; and \$15,099.97 in April 2008). However, in so arguing, Permaday completely ignores that its payments directly to the Oakland County Treasurer were credited towards that balance—as set forth above, under the terms of the land contract, "[a]ll payments are to be applied first to attorney fees, taxes, insurance and other costs allowed under this Land Contract, including late fees, then to interest and the balance to principal." Thus, there is no merit to Permaday's argument in this respect.

As it did in the proceedings below, Permaday also argues that in the absence of an explicit deadline, the time for performance of a contract requirement is presumed to be a reasonable time, and because what constituted a "reasonable time" is a factual question, summary disposition was inappropriate. However, the trial court correctly determined that this argument was essentially moot in light to the fact that the outstanding balance of the unpaid 1997-2006 taxes had been paid as of April 2008.

Accordingly, the trial court correctly granted summary disposition in favor of Great Oaks on Permaday's counter-claim of breach of contract.

C. FRAUDULENT INDUCEMENT

Permaday argues that the trial court erred in granting Great Oaks summary disposition on Permaday's counter-claim of fraudulent inducement.

To establish a prima facie claim of fraudulent misrepresentation, a plaintiff must prove (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its

truth or falsity, and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act on it; (5) the plaintiff acted in reliance on the representation; and (6) the plaintiff suffered damage.^[7]

The trial court found that there was “no evidentiary support for the allegation that prior to the execution of the land contract, [Great Oaks] would pay the property taxes by April 2nd of 2007.” We agree.

In its motion for summary disposition, Great Oaks argued that there was no genuine issue of material fact that it made no misrepresentations to Permaday to induce it to execute the land contract. Permaday submitted an affidavit in support of its argument in response to Great Oaks motion for summary disposition. However, nothing in that affidavit supports that Great Oaks represented to Permaday that it would pay the property taxes by April 2, 1007.

Accordingly, the trial court correctly granted summary disposition in favor of Great Oaks on Permaday’s counter-claim of fraudulent inducement.

D. UNCLEAN HANDS

Permaday argues that the trial court erred in granting summary disposition on Great Oaks’ complaint on the issue of unclean hands.

[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be the abettor of iniquity.^[8]

Permaday argues that the same allegations that support its fraudulent inducement claim also support its unclean hands defense. However, we reject this argument for the reasons stated in the preceding section and conclude that the trial court correctly granted summary disposition in favor of Great Oaks.

III. MOTIONS TO AMEND COUNTER-COMPLAINT

A. STANDARD OF REVIEW

Permaday argues that the trial court erred in denying Permaday’s motions for leave to amend its counter-complaint. “We will not reverse a trial court’s decision to deny leave to amend pleadings unless it constituted an abuse of discretion.”⁹

⁷ *Campbell v Sullins*, 257 Mich App 179, 195; 667 NW2d 887 (2003).

⁸ *Stachnik v Winkel*, 394 Mich 375, 382; 230 NW2d 529 (1975) (internal citations and quotations omitted).

⁹ *Ormsby v Capital Welding, Inc*, 471 Mich 45, 52-53; 684 NW2d 320 (2004).

B. ANALYSIS

MCR 2.118(A)(2) states, in pertinent part: “[A] party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.” Further, MCR 2.116(I)(5) states:

If the grounds asserted [for a judgment granting summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.^[10]

The Michigan Supreme Court has explained that an amendment is not justified for reasons such as “‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.’”¹¹

We conclude that the trial court did not abuse its discretion in denying Permaday’s motions to amend its counter-complaint because the amendment was not justified when Permaday was merely seeking to add a new, futile claim based on the same facts just before trial.¹²

We affirm.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood

¹⁰ See *id.* at 53.

¹¹ *Ben P. Fyke & Sons v. Gunter Co.*, 390 Mich 649, 656; 213 NW2d 134 (1973), quoting *Foman v. Davis*, 371 US 178, 182; 83 S Ct 227, 230; 9 L Ed 2d 222, 226 (1962).

¹² See *Weymers v. Khera*, 454 Mich 639, 659-660; 563 NW2d 647 (1997).