STATE OF MICHIGAN

COURT OF APPEALS

DANIEL DUSAJ and DODA DUSAJ,

Plaintiffs-Appellants,

v

INTERBAY FUNDING LLC and GREGORY GOFORTH,

Defendants-Appellees,

and

IB PROPERTY HOLDINGS LLC,

Defendant/Cross-Defendant-Appellee,

and

ASIM KETA, ETLA KETA, and XHAFERR GACI,

Defendants/Cross-Plaintiffs-Appellees.

UNPUBLISHED
May 18, 2010

No. 289441
Macomb Circuit Court
LC No. 2007-005203-NZ

Before: TALBOT, P.J., and FITZGERALD and M. J. KELLY, JJ.

PER CURIAM.

Plaintiffs, Daniel Dusaj and Doda Dusaj, appeal as of right the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants in this action alleging wrongful eviction against defendants Interbay Funding, LLC, IB Property Holdings, LLC, and Gregory Goforth (the bank defendants), and alleging conversion against defendants, Asim Keta, Etla Keta, and Xhaffer Gaci. We affirm.

FACTS AND PROCEDURAL HISTORY

On October 2, 2002, plaintiffs executed an Asset Purchase Agreement to buy the Metro Beach Café, a restaurant with a Class C liquor license, located at 39539 Jefferson Avenue,

Harrison Township, Michigan. The purchase price of $75,000 represented $50,000 for the personal property, and $25,000 for the liquor license. Angelo Proia, who had a mortgage on the building with Interbay Funding, LLC, owned the commercial building.

In 2004, Proia defaulted on the terms of his mortgage with Interbay and foreclosure proceedings commenced. On April 23, 2004, a sheriff's sale was held, and a Sheriff's Deed on Mortgage Sale was issued to the bank as the successful bidder. The deed was recorded on April 30, 2004. No redemption occurred within the six-month redemption period. Title to the property transferred to the bank on October 23, 2004.

The bank thereafter contracted with defendant Gregory Goforth, a real estate agent, to maintain and sell the property. Goforth went to the property, which was operating as a restaurant, and delivered a note to an employee to be delivered to the owner or manager of the restaurant. Marie Dusaj and plaintiff Doda Dusaj, who were operating the restaurant at the property during October 2004, received the note and contacted Goforth regarding the property. On December 1, 2004, Maria Dusaj, in her capacity as President of OMP Management, Inc., entered into a lease agreement with the bank for a month-to-month tenancy. Goforth and the Dusajs talked about the purchase of the property, but the Dusajs were unable to obtain financing and no agreement was consummated. The Dusajs made a lease payment on December 7, 2004, but failed to make any further payments.

On February 25, 2005, a complaint was filed against the property by Harrison Township for an ordinance violation. The complaint indicated that "Trash has not been collected for 4 – 6 weeks, cover for dumpster laying in yard behind the establishment." It further stated, "Closed down by Sheriff's Dept, 04-09-05 Business not in operation at this time."

Goforth noticed the property appeared abandoned in May 2005. To confirm his suspicions, he inspected the property on approximately three occasions, a week apart. He inspected the property during the normal business hours of a restaurant. He observed that the restaurant was not operating, there were no cars in the parking lot, the lights were shut off, and the condition inside the building, as viewed through the windows, appeared unchanged. He also observed that the grass was high and uncut.

In June 2005, Goforth went to the property with a preservation specialist to secure the property, which included changing the locks. When he entered the restaurant he could see and smell rotting food. Goforth attempted to contact plaintiffs regarding the removal of any belongings they had on the premises. Nearly two months after the locks had been changed, Marie Dusaj came to the property in August 2005 only after being contacted by Goforth. The understanding between Goforth and Maria Dusaj was that she could remove any personal property from the premises at that time.

On November 3, 2005, defendants Keta and the bank entered into a purchase agreement for the property, "together with all fixtures, improvements and appurtenances . . . and heating and cooling system, air purifier, walking [sic: walk-in] cooler, bar and booths, bathroom fixtures, and all fixtures." On that same date, defendants Keta signed a hold harmless agreement for the equipment on the premises.

According to defendant Asim Keta, he walked through the restaurant with Goforth around July 2005. The restaurant was closed and not operational at that time. There was food all over and "a bad smell." It appeared as though the restaurant had stopped operating suddenly. At that time, there was a lady in the building removing personal items. She was identified to Keta as "the previous owner." After deciding to purchase the building, Keta again walked through the restaurant and noticed that booths that had been present during his initial walk through were no longer in the restaurant and that other property was gone, including items such as cutting boards.

Before he could open his restaurant, Asim Keta had to make many repairs to the existing equipment, including the dishwasher, the ice machine, the deep fryers, the walk-in cooler, and the heating and air conditioning system. He also had to purchase new grills. He had to delay the opening of the restaurant until June 2006 because the city would not allow the restaurant to open until the personal property taxes, left unpaid by plaintiffs, were paid. Keta paid those taxes.

After Asim Keta purchased the building, Marie Dusaj did not ask for the return of any personal items. Rather, she asked Keta to purchase the items, and ultimately asked for $50,000. Asim Keta informed Marie that he would first need to see proof that she owned the items before he would negotiate. Marie provided a purchase agreement, but the agreement did not contain any itemization indicating what items were subject to the agreement. Keta informed Marie that she could have items returned if she reimbursed him for the costs of repair, the personal property taxes he paid on the items, and the costs he incurred to store some of the items he did not need in the restaurant. Marie refused.

Both plaintiffs and defendants filed motions for summary disposition. Following a hearing on December 1, 2008, the trial court denied plaintiffs' motion for summary disposition and granted defendants' motion for summary disposition. The trial court stated, in pertinent part:

> Well, the thing that, defendant's Exhibit 7: the Township has closed down the subject business on April 9, 2005. Trash had not been collected for four to six weeks. Dumpster was broken apparently. Collection shut off notices from DTE and Consumers Energy. Grass was overgrown. Door unsecured. Rotting food on premises. And under those circumstances it was clearly an abandonment case.

I

Plaintiffs first argue that they were wrongfully ejected from their leased property, and therefore the trial court erred by granting summary disposition in favor of defendants. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Willett v Waterford Charter Twp,* 271 Mich App 38, 45; 718 NW2d 386 (2006).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996).

Plaintiffs argue that, under MCL 600.2918, the fact that they breached their lease agreement did not give defendant bank the right to use self-help to evict plaintiffs from the property by changing the locks on the building. MCL 600.2918 applies generally to wrongful eviction claims, *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 474; 666 NW2d 271 (2003), and provides in relevant part as follows:

> (2) Any tenant in possession of premises whose possessory interest has been unlawfully interfered with by the owner, lessor, licensor, or their agents shall be entitled to recover the amount of his actual damages or $200, whichever is greater, for each occurrence and, where possession has been lost, to recover possession. Unlawful interference with a possessory interest shall include:
>
> * * *
>
> (c) A change, alteration, or addition to the locks or other security devices on the property without forthwith providing keys or other unlocking devices to the person in possession.

However, MCL 600.2918(3) provides:

> (3) The provisions of subsection (2) shall not apply where the owner, lessor, licensor, or their agents can establish that he:
>
> * * *
>
> (c) Believed in good faith the tenant had abandoned the premises, and after diligent inquiry had reason to believe the tenant does not intend to return, and current rent is not paid.

And, under MCL 600.2918(6),

> An action to regain possession of the premises under this section shall be commenced within 90 days from the time the cause of action arises or becomes known to the plaintiff. An action for damages under this section shall be commenced within one year from the time the cause of action arises or becomes known to the plaintiff.

All defendants pleaded the statute of limitations as a defense in their answers. Defendants Interbay, IB Property Holdings, and Goforth raised the statute of limitations as a ground for summary disposition. Here, the undisputed evidence reveals that plaintiffs made only one rent payment to Interbay in December 2004. At the latest, plaintiff became aware of the lock change in August 2005 when they were given access to the property after Goforth contacted them to remove their personal property. This action was not commenced until December 3, 2007. Consequently, this cause of action was commenced long after the one-year period and is, therefore, barred by the statute of limitations.

Nonetheless, the trial court dismissed plaintiffs' claims of wrongful eviction and claim and delivery after finding that plaintiffs voluntarily abandoned the property. "Two requirements

must be met to establish abandonment. First, it must be shown that there is an intent to relinquish the property and, second, there must be external acts that put that intention into effect." *Sparling Plastic Industries, Inc v Sparling,* 229 Mich App 704, 717-718; 583 NW2d 232 (1998). "Nonuse alone is insufficient to prove abandonment." *Id.* at 718; see also *Ford v Detroit,* 273 Mich 449, 452; 263 NW 425 (1935).

Here, as indicated above, Goforth's inspection of the property revealed that the building was not operating as a restaurant in May 2005. On at least three different weekly visits, Gorforth's inspections revealed that the restaurant was not operating, there were no cars in the parking lot, and the lights were shut off. He also observed that the grass was high and uncut. When looking through the window into the restaurant, he observed dirty dishes with rotting food, and this condition did not change at any time during any of his visits. Documentary evidence was presented that Harrison Township issued a garbage ordinance enforcement on February 25, 2005. The subsequent report stated that trash had not been collected for four to six weeks, that the business was closed down by the sheriff's department on April 9, 2005, and that the business was not in operation at that time. Additionally, natural gas service to the property was shut off to the property on April 20, 2005, for nonpayment. The evidence reveals intent to relinquish the property along with external acts reflecting that intent. Plaintiffs offered no evidence to support their contention that a genuine issue of material fact exists with respect to defendants' defense that plaintiffs voluntarily abandoned the premises.

II

Plaintiffs argue that they are entitled to treble damages from defendants Keta under MCL 600.2919a(1)(a) for conversion of their personal property. This statutory subsection provides as follows:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.

In the civil context, conversion is defined as any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein. *Foremost Ins Co v Allstate Ins Co,* 439 Mich 378, 391; 486 NW2d 600 (1992).

Under the terms of plaintiff's lease agreement, "The lessee shall not vacant [sic: vacate] or abandon the premises during the term of this lease. If the lessee does abandon or vacate the premises or is dispossessed by process of law or otherwise, any of the lessee's personal property that is left on the premises shall be deemed abandoned by the lessee, at the option of the landlord." Because plaintiffs abandoned the premises, any personal property left on the premises

was also deemed abandoned pursuant to the contract, and plaintiffs have no ownership interest in the personal property.[1]

Affirmed. Defendants, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly

[1] Nonetheless, the record reveals that the bank defendants gave plaintiffs the opportunity to remove their personal property and that plaintiffs did, in fact, enter the premises on at least one occasion to do so. Evidence was presented that some items, including cutting boards and tables, were removed.