STATE OF MICHIGAN

COURT OF APPEALS

SHORE ACRES ASSOCIATION, RONALD WHITWAM, KAREN WHITWAM, GERALD VANDERWALL, JESSICA VANDERWALL, DALE RUST, MARY JO RUST, ROSS B. KITTLEMAN, MARY LINDA KITTLEMAN, RONALD KEMINK, GAYLA KEMINK, CYNTHIA CHASSEE, and JILL SCOTT GREGUS,

Plaintiffs-Appellees,

v

JON G. DEHAAN,

Defendant-Appellant,

and

JOANNE JACQUES, ROBERT BLOEM, BARBARA BLOEM, and JOHN WISNIEWSKI,

Defendants.

UNPUBLISHED
July 15, 2010

No. 289969
Ottawa Circuit Court
LC No. 05-052242-CZ

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant-appellant Jon G. DeHaan appeals as of right the trial court's November 14, 2008, order, which resolved the last pending claim in this litigation related to the ownership of water wells and the distribution system in a subdivision and the costs of maintenance and improvements in that subdivision.

The relevant orders specifically challenged on appeal were entered earlier in the case. On May 31, 2007, the trial court granted summary disposition to DeHaan and defendant Joanne Jacques, pursuant to MCR 2.116(C)(10). The court essentially found that DeHaan and Jacques were not required to pay plaintiff Shore Acres Association ("the Association") dues and other assessments imposed by the Association for improvements to the Shore Acres Subdivision ("the Subdivision"). On June 26, 2007, however, the court granted plaintiffs' motion for reconsideration and granted plaintiffs summary disposition. The court noted in its opinion and

order that plaintiffs argued they were not requesting that DeHaan and Jacques pay dues, but were only requesting reimbursement for their proportionate share of the costs for the system of services that the Association provided. Hence, the court recognized that it had mischaracterized these costs in its previous opinion and order by referring to them as "dues." The court concluded that pursuant to the provisions in the original plat and a 1956 court order, DeHaan and Jacques had an implied contract to pay plaintiffs a proportionate share of costs. DeHaan argues on appeal that the trial court committed error requiring reversal when it granted plaintiffs' motion for reconsideration and then granted summary disposition to plaintiffs. DeHaan also argues that the trial court erred when it found that his motion for new trial, filed December 5, 2008, was untimely and did not consider the matter on its merits. We affirm.

I

DeHaan first argues that the trial court committed error requiring reversal when it granted plaintiffs' motion for reconsideration and then granted summary disposition to plaintiffs. DeHaan specifically argues that because the original plat did not include a declaration that expressly provided for assessments, methods for determining the amount of the assessments to the property owners, and a means of collecting the charges, the Association was limited to dues assessed upon the members of the Association and voluntary contributions from the lot owners who were not members of the Association. Thus, because the plat and 1956 court order did not provide that the lot owners were required to do anything with the right of ways and walkways, and the Association merely voluntarily assumed the maintenance and improvement of the right of way and walkways, DeHaan cannot be liable to the Association for the maintenance and improvements. In addition, DeHaan asserts that he pays directly for any benefit he receives from electricity, street lighting, snow removal, etc., and should not be required to pay the annual association fee which also encompasses matters like attorney fees, postage for communication with members, and membership parties. Finally, he argues the trial court erred when it relied on *Tomkins Lakes Estates Ass'n, Inc v Speisman*, 51 Misc 2d 488; 273 NYS 2d 457 (1966), and found that the circumstances of this case gave rise to a contract implied in fact. Thus, the trial court erred when it granted plaintiffs' motion for reconsideration and then granted summary disposition to plaintiffs. We disagree.

"We review a trial court's decision on a motion for reconsideration for an abuse of discretion." *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 629; 750 NW2d 228 (2008). We review de novo a trial court's decision to grant or deny summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). MCR 2.116(I)(1) provides, with regard to motions for summary disposition, "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."

"A contract implied in fact arises 'when services are performed by one who at the time expects compensation from another who expects at the time to pay therefor.'" *In re Lewis Estate*, 168 Mich App 70, 75; 423 NW2d 600 (1988) (citation omitted). We conclude that the trial court correctly determined that a contract implied in fact existed that required DeHaan to pay a proportionate share of costs for the system of services that the Association provides within the Subdivision. It is clear from the record that when DeHaan became the owner of property in the Subdivision, he was fully aware of the dedication in the plat and the 1956 court order declaring that all roads, drives, and walks in the Subdivision were private and were owned by the

abutting lot owners and held in trust for the use and benefit of all the lot owners in the Subdivision. It is also clear that when DeHaan became the owner of property in the Subdivision, he was fully aware of the function that the Association served in making improvements to the Subdivision and billing lot owners for their proportionate share of the costs. Based on this undisputed knowledge by DeHaan, there are no questions of material fact with respect to the existence of a contract implied in fact. The trial court correctly concluded that there was a contract implied in fact because when the Association performed services for the benefit of DeHaan by making improvements to the Subdivision, the Association expected compensation from the lot owners, including DeHaan. See *id*. In addition, we conclude that DeHaan essentially expected to pay for those services at the time those services were rendered. See *id*.

DeHaan voluntarily chose to own property within the Subdivision knowing about the dedication in the plat, the 1956 court order, and that the Association performed services for the benefit of lot owners by making improvements to the Subdivision.[1] Thus, DeHaan cannot subsequently contend that he did not expect to pay for such services. In other words, when DeHaan undertook purchasing property in the Subdivision, he impliedly accepted an offer by the Association to provide a system of services for the betterment of the Subdivision, and that when he impliedly accepted such offer, he impliedly agreed to share proportionately in the cost. The fact that DeHaan claims he pays his share directly to service providers has no bearing on our decision. The Association contracts with and monitors services and expected compensation from the property owners. In reaching our conclusion, we find the opinion in *Tomkins Lakes Estates Ass'n*, 51 Misc 2d at 490, instructive and persuasive where a similar conclusion was reached. Based on the foregoing, we conclude that the trial court correctly determined that plaintiffs were entitled to summary disposition because there was no genuine issue of material fact whether DeHaan was required to pay his proportionate share of the costs of the system of services, from which he benefited, which were provided by the Association. See MCR 2.116(I)(1) and (2); *Coblentz*, 475 Mich at 568. Accordingly, the trial court did not abuse its discretion when it granted plaintiffs' motion for reconsideration because, as the court stated in its opinion and order granting plaintiffs' motion, it initially erred in interpreting the costs that plaintiffs were seeking as dues and also erred in analyzing the court's decision in *Tomkins*. See MCR 2.119(F)(3); *Woods*, 227 Mich App at 629.

II

DeHaan also argues that the trial court erred when it found that his motion for new trial, filed December 5, 2008, was untimely and did not consider the matter on its merits. DeHaan contends that MCR 2.611 does not preclude a motion for new trial after a final judgment is entered.

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[1] In an April 18, 2007, affidavit, DeHaan stated, "I have owned, either by myself or jointly with others, these lots since 1975. My parents owned other lots in the Subdivision in 1936. My parents were members of the Association since it was incorporated. I have been acquainted with the affairs of the Association and the Subdivision since the Association was formed in 1946, through the participation of my parents and my own personal participation." DeHaan was admittedly a member of the Association until 1996.

The decision whether to grant a new trial is in the trial court's discretion and is reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). We also review "a trial court's decision on a motion for reconsideration for an abuse of discretion." *Woods*, 277 Mich App at 629. Principles of statutory construction apply to court rules and present questions of law that are reviewed de novo. *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526-527; 672 NW2d 181 (2003).

In this case, the plain language of MCR 2.611(B) provides that "[a] motion for a new trial made under this rule or a motion to alter or amend a judgment must be filed and served within 21 days after entry of the judgment." Thus, MCR 2.611 does not only apply to requests for new trial but also applies to requests to amend a judgment. However, a review of DeHaan's motion and arguments indicates that DeHaan's motion essentially requested the trial court to vacate its June 26, 2007, decision and reinstate its May 31, 2007, opinion and order, which granted DeHaan summary disposition. Thus, the motion requested reconsideration of the trial court's order granting plaintiffs' motion for reconsideration and granting plaintiffs summary disposition. Hence, the motion should have been brought pursuant to MCR 2.119(F).

Pursuant to MCR 2.119(F)(1), a motion for "reconsideration of the decision on a motion must be served and filed not later than 21 days after entry of an order deciding the motion." The plain language of the court rule provides that reconsideration of the trial court's decision granting plaintiffs' motion for reconsideration and summary disposition must be served within 21 days of the order deciding plaintiffs' motion for reconsideration. Hence, because the trial court granted plaintiffs' motion and granted plaintiffs summary disposition on June 26, 2007, and DeHaan moved for a new trial 17 months later on December 5, 2008, DeHaan's motion was not brought within the 21 days required by MCR 2.119(F)(1). Based on the foregoing, the trial court did not abuse its discretion in denying DeHaan's motion because it was untimely. See *Kelly*, 465 Mich at 34; *Woods*, 277 Mich App at 629. Furthermore, regardless of the untimeliness of DeHaan's motion for new trial, the motion lacked merit based on our analysis set forth above.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering