

STATE OF MICHIGAN
COURT OF APPEALS

SHELDON FUTERNICK, d/b/a HOLIDAY
WEST MOBILE HOME PARK,

Plaintiff-Appellee,

v

VANDERBILT MORTGAGE AND FINANCE,
INC.,

Defendant-Appellant.

UNPUBLISHED
July 24, 2012

No. 302987
Wayne Circuit Court
LC No. 10-012085-AV

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order affirming the judgment of the district court in this property action. We affirm.

FACTS AND PROCEDURAL HISTORY

This case arose from the abandonment of a mobile home in plaintiff's park by John Kwiecinski. He financed the home with a mortgage to Bank One, and defendant subsequently acquired the mortgage. After defaulting on his loan, Kwiecinski sent a letter to plaintiff, the mobile home park where the mobile home was located, indicating that he was turning the home over to defendant and that he would bring the keys to plaintiff. Mr. Kwiecinski also filed for bankruptcy, leaving defendant with a lien on the property¹. After defendant learned that the home was abandoned, it sent a representative to inspect the home and change the locks in order to secure it and prevent future damage to it. Upon inspection, defendant decided the home was worthless to it and wanted to release its lien.

In October 2005, plaintiff began to send the lot rent invoices to defendant, who never paid. In early April, 2007, defendant sent plaintiff a letter stating that defendant had released the lien and had sent the necessary paperwork to the Secretary of State. Defendant sent the letter again in October 2007 because plaintiff continued to send defendant invoices for lot rent. In

¹ Kwiecinski is not a party to this action and apparently is nowhere to be found.

March 2009, plaintiff offered to forgive the lot rent in exchange for the title to the home or a termination statement. Defendant informed plaintiff that it did not have the title to the home because Kwiecinski had it and he was nowhere to be found, and that it could not provide plaintiff with an additional termination statement because it sent the original to the Secretary of State. Plaintiff continued to send lot rent invoices to defendant, and defendant continued to not pay them. Plaintiff also sent a request for title search to the Secretary of State, which found that Bank One, the mortgagor, still had title to the mobile home. Plaintiff filed suit against defendant seeking back lot rent from 2005 to 2010.

The trial court found in favor of plaintiff because defendant exercised control over the property because defendant did not discharge the lien the “normal or usual way that liens . . . are discharged”. Defendant also knew in March 2009, that there had been an ineffective lien discharge and took no steps to remedy the situation. Because of that, the trial court found defendant liable for lot rent, maintenance fees, and late charges from the date Kwiecinski’s obligations were discharged through the date defendant first notified plaintiff that the discharge had been sent to the Secretary of State. The trial court did not find defendant liable from April 2007 through March 2009, because during that time, plaintiff failed to notify defendant that it required a termination statement. Defendant was also found liable for lot rent and fees from April 2009 through September 2010, because plaintiff notified defendant in March 2009, that it required a termination statement to obtain title and defendant failed to provide either.

Defendant appealed to the Wayne Circuit Court, arguing that plaintiff ignored defendant’s attempts to communicate that defendant did not intend to repossess the home and that it took no affirmative action to exercise control over the property. The circuit court affirmed the district court’s ruling, stating that the failure to release the lien is construed as constructive possession. Both parties and the lower courts relied on *Green Tree Servicing, LLC v Sheldon Futernick*, unpublished order of the Wayne Circuit Court, entered May 26, 2006 (Case No. 04-434054-PD) and this Court’s affirmance of the same in *Green Tree Servicing, LLC v Sheldon Futernick*, unpublished opinion per curiam of the Court of Appeals, issued February 3, 2009 (Docket Nos. 274936 and 279215). Defendant now argues that the circuit court erred because defendant took no affirmative act to control the mobile home. We disagree.

STANDARD OF REVIEW

A trial court’s findings of fact following a bench trial are reviewed for clear error. *Trader v Comerica Bank*, 293 Mich App 210, 215; 809 NW2d 429 (2011). A trial court’s conclusions of law are reviewed de novo. *World Architects and Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006).

ANALYSIS

Both parties and the lower court erred to the extent they treated *Green Tree* as binding. *Green Tree* is an unpublished case and therefore “not precedentially binding under the rule of stare decisis.” MCR 7.215(C)(1). Even though both parties agreed that *Green Tree* is controlling, “[a] stipulation by the parties regarding a matter of law is not binding on [this] court.” *Staff v Johnson*, 242 Mich App 521, 529; 619 NW2d 57 (2000). However, the parties and the lower courts correctly determined that no other published case law exists on point and

therefore properly treated *Green Tree* as persuasive. We agree with the reasoning applied in *Green Tree* and apply it to the matter at bar.

In *Green Tree*, owners of several mobile homes defaulted on their loans. *Green Tree*, slip op at 2. The plaintiff repossessed the homes, but left the homes in the defendant's parks for several months. *Id.* The circuit court found that an implied-in-fact contract existed between the parties when repossession occurs, so that the plaintiff would therefore owe lot rent from the time of repossession. This Court affirmed that implied-in-fact contract, evinced by both the usual business practice that those who repossess homes in the industry are expected to pay lot rent, and by the fact that the plaintiff did pay lot rent but then eventually stopped. *Green Tree*, slip op at 3. Once a home is repossessed, an implied-in-fact contract exists wherein the defendant would expect lot rent for the plaintiff's repossessed homes. *Id.* This Court implied that changing the locks may not be determinative by itself of whether a party has actually taken control of the home. *Green Tree*, slip op at 5.

Consistent with the holding in *Green Tree*, when parties do not explicitly manifest their intent to contract by words, their intent may be implied from their conduct, their language, and other circumstances of the transaction. *Featherston v Steinhoff*, 226 Mich App 584, 589; 575 NW2d 6 (1997). However, neither party disputes that if defendant did repossess the home, an implied-in-fact contract exists, making defendant liable to pay for lot rent. Rather, the issue is whether defendant controlled the home and repossessed it, so an implied-in-fact contract would be created.

Traditionally, "control" of property is understood as the exercise of "restraint or direction over; dominate, regulate, or command" over property. *Hoffner v Lanctoe*, 290 Mich App 449, 453; 802 NW2d 648 (2010). Defendant argues that physical possession is necessary. Consistent with some of the implications in *Green Tree*, we disagree. It is possible to have constructive control over something even without direct physical possession. See *In re Fees of Court Officer*, 222 Mich App 235, 247; 564 NW2d 509 (1997). Possession and control are related concepts referring to the power to exercise dominion over something; it is well-established that possession can be constructive. See *People v Fick*, 487 Mich 1, 12-14; 790 NW2d 295 (2010). The record here supports the district court's finding that defendant effectively controlled the home by controlling the title; defendant therefore owed lot rent during that time.

The trial court in this case noted that the typical practice in the industry to a release a lien involves sending a termination statement to both the Secretary of State and the mobile home park. This allows the mobile home park to request an abandonment of title and gain control over the home. While defendant asserts that he sent a termination statement to the Secretary of State, defendant admits it did not send one to plaintiff. Plaintiff, therefore, could not obtain title to the home absent a court order or surety bond, both of which would still be difficult absent a termination statement. Therefore, plaintiff billed defendant for lot rent because defendant retained control over the home by controlling whether plaintiff could obtain title to the home.

Additionally, defendant received the invoices for lot rent beginning in November 2005. Despite this, defendant did not indicate to plaintiff that it had released the lien until April 2007, 15 months after defendant had sent a termination statement to the Secretary of State and Kwiecinski's obligations had been discharged. The act of sending invoices to defendant put

defendant on notice that plaintiff believed that defendant retained a lien on the property. Despite having notice of this, defendant took no steps to resolve plaintiff's alleged misconception; defendant did not even protest the bills. The fact that defendant failed to send the termination letter to plaintiff supports the trial court's finding that defendant effectively prevented plaintiff from obtaining title by failing to follow typical protocol for releasing liens on mobile homes. Therefore, the trial court's finding that defendant had control over the property was not clearly erroneous.

Moreover, plaintiff testified that its representative told defendant in March 2009 that it required a termination statement and offered to forgive the rent in exchange for a termination letter. Plaintiff's representative and a Secretary of State branch manager explained at trial that a termination statement, also known as a release of lien, was necessary to obtain an abandonment title to the home.² Plaintiff's statement and offer gave defendant notice that its release was ineffective and that plaintiff did not have the termination statement that it required.³ Defendant refused to send plaintiff a termination statement and, at trial, even conceded that there was technically no reason why it could not have done so. To ensure that defendant still retained the lien, plaintiff even performed a title search, finding that the lien was still on the property. The trial court's finding that defendant's refusal to send a termination letter to allow plaintiff to gain control over the home also constituted control and was not clearly erroneous.

Because defendant exercised control over the property from January 2006 through April 2007 and April 2009 through September 2010, the trial court properly found that an implied-in-fact contract existed making defendant liable for lot rent, maintenance and late fees.

CONCLUSION

The trial court did not err in finding defendant liable for the sum of back lot rent, maintenance and late fees accrued during the time defendant had control.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra

² The branch manager explained that a court order, should a judge decide to issue one, or a five-year surety bond for twice the value of the home could also be used to obtain a new title to the home. However, with a termination statement, the lien would be discharged with no further expense or procedural hurdles.

³ The record does not clearly indicate that plaintiff explicitly told defendant why it needed the termination statement, but it appears to us from the testimony as a whole that defendant was aware of the significance of termination statements.