

STATE OF MICHIGAN
COURT OF APPEALS

GERBER FEDERAL CREDIT UNION,

Plaintiff-Appellant,

UNPUBLISHED
April 24, 2012

v

NORMAN J. SHIELDS and KITTYJO M.
SHIELDS,

No. 303663
Newaygo Circuit Court
LC No. 10-019532-CK

Defendants-Appellees.

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's judgment of no cause of action in favor of defendants, and an order denying plaintiff's motion for a new trial. Because the trial court's factual findings were not clearly erroneous and its decision was not against the great weight of the evidence, we affirm.

Plaintiff initiated this lawsuit against defendants for breach of contract (waste to property) and statutory conversion when fixtures from a home that defendants had lost to foreclosure were found to be missing. In January 2008, plaintiff and defendants entered into a mortgage contract for a residence in White Cloud, Michigan. Defendants defaulted on the mortgage and on March 17, 2009, a sheriff's deed was issued on the White Cloud residence. Plaintiff's collections manager, Charlene Morris, went to the White Cloud residence in late June or early July of 2009. Morris testified that at that time the White Cloud residence appeared abandoned and she was able to enter the residence through an unlocked door. Morris further testified that she found that several fixtures, including kitchen cabinets, a toilet, a sink, the water panel, the water heater, the furnace, and a side deck, had been removed. Morris testified that she took several pictures of the interior of the White Cloud residence at that time.

Later, plaintiff discovered that defendants had moved into a new home in Newaygo, Michigan. Morris went to the Newaygo residence and, in the presence of KittyJo Shields, took photographs of the interior fixtures. According to Morris, the cabinets in defendants' new home appeared to be the same as those that were in the White Cloud home, and the countertops in their new home appeared to be similar to those in the White Cloud house.

At the bench trial conducted in this matter, plaintiff entered photographs taken by the listing agent of the intact fixtures in the White Cloud residence. Plaintiff also presented the

photographs taken by Morris at both the White Cloud residence and the Newaygo residence. In addition, plaintiff presented the testimony of Roy Jones, a long-time acquaintance of defendants. Jones testified that defendant Norman Shields had bragged to him about taking fixtures from the White Cloud residence, including cabinets, a toilet, and countertops, and installing them in the Newaygo residence.

Defendants testified on their own behalf. Norman Shields testified that except for an outside wood burner which was subject to a separate loan, he had not taken any fixtures from the White Cloud residence. He also testified that he had purchased and installed all of the fixtures at the White Cloud residence pursuant to a construction loan with plaintiff, and that he had also purchased and installed the fixtures at the Newaygo residence. He testified that the cabinets were similar at the two residences because he had purchased them at the same place, and he denied that the countertops were the same. Norman Shields acknowledged that while he had been unable to make his \$605.00 monthly mortgage payment to plaintiff, he had invested approximately \$6,000.00 into the Newaygo residence, which he obtained through a loan, store credit, and personal income. On cross-examination, Norman Shields conceded that he had not brought any receipts for the Newaygo residence fixtures to trial.

At the conclusion of the trial, the trial court observed that plaintiff's case was almost entirely circumstantial, and found defendants' testimony to be credible. The trial court also found that plaintiff's only piece of direct evidence, the testimony of Roy Jones, was not credible. The trial court found in favor of defendants. The trial court thus found in favor of defendants and dismissed the case. The trial court also denied plaintiff's later motion for a new trial.

On appeal, plaintiff argues that the trial court's decision in favor of defendants was against the great weight of the evidence. We disagree.

We review the trial court's findings of fact in a bench trial for clear error, and review its conclusions of law de novo. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 651; 662 NW2d 424 (2003). A finding is clearly erroneous if, although there is evidence to support it, we are left with a definite and firm conviction that a mistake was made. *Id.* at 652. Deference should be given to the trial court's superior ability to assess the credibility of the witnesses. *Id.*

To decide whether a verdict is against the great weight of the evidence requires review of the entire body of proofs. *Dawe v Bar-Levav & Assoc (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). If the evidence conflicts, questions of credibility ordinarily should be left to the factfinder. *Id.*

Plaintiff's principal evidence consisted of the photographs from the White Cloud and Newaygo residences and the testimony of Roy Jones. The photographs demonstrate that the cabinets, sink, and countertops found in the Newaygo residence are similar to but not clearly identical with the cabinets, sink, and countertops found in the White Cloud residence. Thus, these photographs, while potentially persuasive, are not dispositive. Norman Shields explained that the fixtures in the Newaygo Residence were similar to the fixtures that had been in the White Cloud Residence because he had purchased both sets at the same place and installed them both, and the trial court found his testimony to be credible. Given the testimony and the trial

court's superior ability to determine credibility, we do not conclude that the trial court's finding was clearly erroneous.

The trial court found the testimony of Roy Jones to be wholly unpersuasive, and flatly stated that it did not believe Roy Jones. Again, given the non-dispositive nature of the photographs and the deference accorded to the trial court's superior ability to assess the credibility of the witnesses, we hold that this finding was not clearly erroneous.

Plaintiff notes that defendants concede that they were in possession of the White Cloud residence when plaintiff's locksmith went to that property, and that the record shows that the locksmith was sent out in July, *after* Morris discovered that the White Cloud residence had been stripped. Plaintiff reasons that these circumstances support a conclusion that defendants must have stripped the White Cloud residence. However, while defendants acknowledged that they sent a locksmith away, the locksmith indicated that he went to the White Cloud residence in June, not July. Morris told the trial court, "I thought the locksmith was out in July but the locksmith's actual statement says June." Morris indicated that when she went to the White Cloud residence in late June or early July, she found it abandoned and unoccupied. These significant factual discrepancies preclude a rejection of the trial court's findings as clearly erroneous.

The trial court's findings of fact were not clearly erroneous. Thus, the trial court did not err by finding in favor of defendants and denying plaintiff's motion for a new trial.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens