STATE OF MICHIGAN

COURT OF APPEALS

BASIL T. SIMON RECEIVER,

Plaintiff,

v

2400 SCIENCE PARKWAY, L.L.C., and ERICH J. SPECKIN,

Intervenors-Appellants,

and

MERCANTILE BANK MORTGAGE CO., L.L.C.,

Defendant-Appellee.

UNPUBLISHED
December 13, 2012

No. 305188
Ingham Circuit Court
LC No. 10-000927-CZ

Before: GLEICHER, P.J., and SAAD and RONAYNE KRAUSE, JJ.

PER CURIAM.

This case arises from a real estate transaction that ended badly. The buyer, 2400 Science Parkway, L.L.C., defaulted on its mortgage with Huntington Bank. The default placed a guarantor, Erich J. Speckin, on the hook for the mortgage indebtedness. 2400 sued the seller of the property, Mercantile Bank Mortgage Co., claiming it had overpaid based on Mercantile's material misrepresentations. A complex series of procedural maneuvers ensued, conducted on two legal fronts.

In one courtroom, 2400 pursued its misrepresentation claims against Mercantile. In a separate action, Huntington sued Speckin and 2400 seeking to recoup its mortgage investment in the property. A receiver ultimately assumed control of 2400's misrepresentation action and sold it at auction. The narrow question before us is whether the trial court abused its discretion when it refused to permit 2400 and Speckin to intervene in the misrepresentation case after the receiver disposed of it.

A motion to intervene must be timely. Because this motion was not heard until after 2400's cause of action had been sold, the trial court acted within his discretion in denying it.

I. UNDERLYING FACTS AND PROCEEDINGS

Speckin is the principal owner of 2400 Science Parkway, L.L.C. In June 2008, 2400 purchased a commercial office building from Mercantile. Mercantile held the landlord's interest in several leases to building tenants. As part of the sale, Mercantile agreed to assign the leases to 2400. Huntington provided funding for 2400's purchase of the building. 2400 executed a mortgage in favor of Huntington and Speckin personally guaranteed the loan.

In August 2010, 2400 sued Mercantile in the Ingham circuit court, alleging that Mercantile had fraudulently misrepresented the value of the leases. 2400's complaint also stated claims for unjust enrichment and violation of the Michigan Consumer Protection Act, MCL 445. 901 *et seq.* This case, which we refer to as the Mercantile action, was assigned to Judge Rosemarie Aquilina.

Within approximately the same time frame, 2400 defaulted on its mortgage. In September 2010, Huntington commenced a foreclosure action and contemporaneously sued Speckin in the Ingham circuit court seeking recovery under the personal guarantee.[1] Huntington's suit was assigned to Judge William E. Collette, and we refer to it as the collection case.

Soon after the collection case commenced, Judge Collette appointed plaintiff Basil Simon as receiver of 2400's assets. Judge Collette's order permitted Simon to "defend, compromise, adjust, intervene in, dispose of, or become a party to any actions in state, federal or foreign court necessary to preserve or increase the assets of [2400]."

Relying on this order, Mercantile moved in the misrepresentation case pending before Judge Aquilina to substitute Simon as the plaintiff in place of 2400. The circuit court record reflects that 2400 failed to timely file a written response to Mercantile's motion. On March 16, 2011, Judge Aquilina conducted a bench hearing and granted the request for substitution.[2] The subsequent order stated that Simon "is hereby substituted as the party plaintiff in this action, in the place of 2400 Science Parkway, LLC." The order further provided, "Motions to intervene may be filed within 28 days."

Within the allotted 28 days, Speckin and 2400 filed a motion to intervene in the Mercantile action. Speckin and 2400 asserted that Simon intended to dismiss the Mercantile case and that "[t]he only feasible way for Speckin and 2400 to protect their interest is to ensure that the fraudulent conduct of Mercantile . . . is prosecuted to the fullest extent possible." Speckin and 2400 scheduled a hearing on their motion for May 11, 2011, before Judge Aquilina.

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[1] Huntington also sued a number of other defendants in the same action; those claims are not relevant to this case.

[2] According to the circuit court record, 2400 finally filed its response to Mercantile's motion on March 24, 2011. The parties did not file with this Court a transcript of the motion hearing.

On May 5, 2011, seven days before the hearing was to take place before Judge Aquilina, Judge Collette entered an order consolidating the collection case and the Mercantile action. The order provided that "any motions currently pending in either action shall be brought on for hearing before the Hon. William E. Collette, Wednesday, May 11, 2011 at 11:00 a.m., or as soon thereafter as counsel may be heard." Counsel for Speckin and 2400 approved this order as to both its form and its content.

According to the circuit court register of actions, Judge Collette did, in fact, hold a hearing on May 11, at which the motion to intervene was scheduled to be heard. The parties have not provided this Court with the transcript of that hearing. Apparently, however, Speckin and 2400 did not argue their intervention motion on May 11. Thereafter, on May 19, 2011, Judge Collette signed an order authorizing Simon to sell 2400's claims against Mercantile.[3]

On June 3, 2011, 2400's claims against Mercantile were offered for sale at an auction, and Mercantile purchased them for $10,000. Speckin participated in the auction, but Mercantile outbid him.

At a hearing held on June 8, 2011, Judge Collette granted Simon's motion for authority to sell 2400's real estate to pay its creditors. The following colloquy then ensued between Judge Collette and Michael F. Matheson, counsel for 2400 and Speckin:

> *Mr. Matheson*: Your Honor, there is another matter pending that was noticed for hearing today that was advised of counsel on the motion.
>
> *The Court*: What's that, sir? I don't remember anything here. Tell me what it is.
>
> *Mr. Matheson*: There was a motion to intervene that had been filed in front of Judge Aquilina prior to the cases being consolidated.
>
> *The Court*: Intervene in what?
>
> *Mr. Matheson*: In the Mercantile matter on behalf of Mr. Speckin. That motion had never actually been heard based on the consolidation of the cases. And that had been renoticed for today. Counsel for Mercantile and the Receiver were apprised of that and had no objection. It had been a pending motion and we would simply ask the Court to formally consider and rule on that motion to intervene.
>
> *The Court*: I see. We have had several other hearing dates when that could have been raised.

[3] This order is not in the record either, but the parties agree as to its content.

Mr. Matheson: This in an effort to avoid having these gentlemen come in from out of town again for another hearing date, which is probably –

The Court: That's not what I was talking about. We have had other hearings in the past, a number of times, where this could have been raised.

Mr. Matheson: The sale of the Mercantile claim just occurred last week, which brought to light the need to have the motion formally considered by the Court. And rather than pick some other date --

The Court: That makes no sense.

Mr. Matheson: -- it was noticed for today.

The Court: That sale was going forward long before last week. All right. Your motion is denied, Counsel.

Mr. Matheson: Thank you, Your Honor.

The Court: Thank you.

Mr. Shier:[4] Your Honor, I have nothing to say other than I have a proposed, perfunctory order to resolve it.

The Court: Sure.

Mr. Shier: It just says for reasons stated on the record.

The Court: Any objections?

Mr. Stella: None, Your Honor.

Mr. Heywood: None, Your Honor.

The Court: Any objections, Mr. Matheson?

Mr. Matheson: If it's going to state for the reasons stated on the record, I guess I would just ask for clarification as to the reason for the denial of the motion to intervene.

The Court: Your motion is denied.

Mr. Matheson: Thank you, Your Honor.

[4] Andrew C. Shier represented Mercantile in the proceedings.

The order entered following the hearing recites that Mercantile "has purchased and acquired all right, title and interest . . . in all claims 2400 Science Parkway has against Mercantile[,]" and dismissed the Mercantile case with prejudice.

2400 and Speckin now challenge Judge Collette's intervention ruling.

II. ANALYSIS

We review for an abuse of discretion a circuit court's decision to deny intervention. *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761; 630 NW2d 646 (2001). An abuse of discretion occurs when a court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> MCR 2.209 governs intervention, and provides in relevant part:
> (A) Intervention of Right. On timely application a person has a right to intervene in an action:
>
> (1) when a Michigan statute or court rule confers an unconditional right to intervene;
>
> (2) by stipulation of all the parties; or
>
> (3) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (B) Permissive Intervention. On timely application a person may intervene in an action
>
> (1) when a Michigan statute or court rule confers a conditional right to intervene; or
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> *In exercising its discretion, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.* [Emphasis added].

Speckin and 2400 first assert that the circuit court erred by denying their intervention motion "without explanation." Although the basis for the circuit court's decision to deny intervention could have been stated more clearly, we detect no error. Speckin and 2400 failed to bring their intervention motion before the court until after the cause of action had been sold. Judge Collette specifically noted that the intervention request could have been heard earlier ("We have had several other hearing dates when that could have been raised."). The court further

observed that the sale of the cause of action "was going forward long before last week," and denied the motion. A fuller legal explanation for this ruling might have been useful. Nevertheless, we clearly understand Judge Collette to have determined that the intervention motion hearing came too late, and discern no basis to disturb this ruling on the ground that it lacked adequate explanation.

Speckin and 2400 next contend that they were entitled to intervene in the misrepresentation action to preserve their ability to prosecute it. We reject this argument for the simple reason that the circuit court did not abuse its discretion by finding their intervention motion untimely.

Speckin and 2400 first expressed a desire to intervene in March 2011, when the receiver assumed control of the Mercantile litigation. Although Speckin and 2400 timely filed their intervention motion pursuant to Judge Aquilina's order, the Mercantile case was consolidated with the collection action pursuant to Judge Collette's order. That order specified that all pending motions were to be heard on May 11. Counsel for Speckin and 2400 approved the substance of the consolidation order, and actually appeared before Judge Collette on May 11. But Speckin and 2400 failed to bring their intervention motion before Judge Collette on that date. Instead, they participated in the June 3 auction and unsuccessfully attempted to purchase their cause of action outright. Only after this gambit failed did Speckin and 2400 bring their intervention motion to Judge Collette's attention.

"Whether the application for intervention is timely is a matter for the sound discretion of the trial court." 2 Longhofer, Michigan Court Rules Practice (5th ed), § 2209.1, p 113. "[A]n intervenor must be diligent, and any unreasonable delay after knowledge of the action will justify a denial of intervention where no satisfactory excuse is shown for the delay." *Prudential Ins Co of America v Oak Park Sch Dist*, 142 Mich App 430, 434; 370 NW2d 20 (1985). In *Davenport v Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400; 534 NW2d 143 (1995), this Court considered whether the circuit court correctly denied intervention to the neighbors of a party seeking a zoning variance. This Court found the motion untimely because "it was not filed until after the circuit court issued its decision." *Id.* at 408.

In *Dean v Dep't of Corrections*, 208 Mich App 144, 150; 527 NW2d 529 (1994), this Court explained:

> There should be considerable reluctance on the part of the courts to allow intervention after an action has gone to judgment and a strong showing must be made by the applicant. See 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil (2d ed), § 1916, p. 444. "It must be very obvious that a great distinction must be observed between an intervention occurring before judgment is rendered . . . and another case in which intervention is sought, as in the instant case, after judgment has been rendered." [Citation omitted, alteration in original].

Unlike in *Dean*, the Mercantile action had not yet "gone to judgment" when Speckin and 2400 brought their intervention motion to Judge Collette's attention. But granting it would have required that the parties unravel the sale to Mercantile. Judge Collette's decision that the request for intervention came too late falls well within the range of principled outcomes.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause