STATE OF MICHIGAN

COURT OF APPEALS

FRANDORSON PROPERTIES, a Michigan Limited Partnership,

Plaintiff-Appellee,

v

KEITH JOSEPH MITAN, KENNETH MITCHELL MITAN, TERESA FRANCES MITAN, MITAN PROPERTIES COMPANY, V, a Michigan Limited Partnership, MITAN PROPERTIES COMPANY, VI, a Michigan Co-partnership, and MITAN DOUBLEWOOD ANCILLARY CONTROL SECTION, INC., a Michigan Corporation.

Defendants-Appellants.

UNPUBLISHED
December 13, 1996

No. 182423
LC No. 94-078210-CH

Before: Young, P.J., Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Defendants appeal by right an order striking their answer to plaintiff's complaint and granting summary disposition in favor of plaintiff under MCR 2.116(C)(9). The order was issued after defendants filed their answer without posting a $38.4 million security bond, contrary to an earlier court order that prohibited defendants from filing any pleadings until such a bond was posted. We affirm in part, reverse in part, and remand for further proceedings.

I. *Underlying Facts and Procedural History*

Defendant Mitan Properties Company, VI ("Mitan VI") is a partnership composed of defendants Keith J. Mitan and Kenneth Mitan. On August 7, 1993, Mitan VI entered into a purchase agreement with plaintiff, Frandorson Properties, whereby Mitan VI agreed to purchase from plaintiff three shopping centers[1] for $21,976,832.10. Plaintiff alleges that Mitan VI subsequently defaulted on

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* Circuit judge, sitting on the Court of Appeals by assignment.

the purchase agreement by failing to tender various deposits required by the agreement and by failing to obtain a required financing commitment, thereby rendering the agreement null and void under its terms.

On April 21, 1994, Mitan VI tendered to plaintiff a second offer to purchase the three shopping centers, this time for a price of $16,500,000. Plaintiff did not accept this offer. Instead, plaintiff entered into an agreement with Chemical Bank of New York, whereby plaintiff agreed to convey its interest in the three shopping centers to Chemical Bank in lieu of foreclosure. A closing date of July 20, 1994, was set.

On July 15, 1994, five days before the scheduled closing with Chemical Bank, Mitan VI filed a complaint in the Ingham Circuit Court, alleging an interest in the subject shopping centers pursuant to the August 7, 1993, purchase agreement ("Case I"). At the same time, Mitan VI recorded a lis pendens in both Ingham County and Clinton County for the purpose of notifying interested parties that an action was pending seeking "the transfer and conveyance to [Mitan VI] of title to the propert[ies]" in question. The case was assigned to Circuit Judge Carolyn Stell. On July 18, 1994, plaintiff filed its answer, together with a counter-complaint against Mitan VI, and Keith and Kenneth Mitan, alleging slander of title and tortious interference with a business or contractual relationship. Plaintiff also filed a motion for bond with surety as security. An expedited hearing was conducted on July 19, 1994, by Circuit Judge James Giddings, acting in place of Judge Stell, who was unavailable. Following oral arguments, Judge Giddings ordered Mitan VI to post a security bond with surety in the amount of $38.4 million by 1:00 p.m. on July 21, 1994. Judge Giddings also ordered that if the security bond was not posted by the date and time required, Mitan VI's complaint would be dismissed and Mitan would be enjoined from refiling any action or related action for a period of forty-five days. Judge Giddings gave the following reasons in support of his decision to issue the order: (1) that submitted documentation "belies any assertion that [Milan VI] can rightfully claim that there is a lawful basis to proceed"; (2) Mitan VI's failure to demonstrate "that they have any lawful claim whatsoever arising out of the [August 7, 1993, purchase agreement]"; (3) "inconsistencies demonstrated by the conduct of [Mitan VI and its agents] in this matter"; and (4) that interference with the pending sale of the properties would have "a significant compelling effect on the financial future of [Plaintiff]."

Mitan VI did not post a security bond as ordered. Consequently, on July 21, 1994, Judge Giddings issued an order dismissing Mitan VI's complaint and canceling all the lis pendens recorded by Mitan VI or its agents with respect to the properties in question. Additionally, the court enjoined Mitan VI from refiling its action or a related action for forty-five days. In the meantime, Mitan VI filed an appeal with this Court from the July 19 order requiring it to post a security bond. At the same time, it recorded a second set of lis pendens, this time using the caption of this Court on the lis pendens.[2]

On the following day, Friday, July 22, 1994, plaintiff filed a motion for bond, injunctive relief and contempt in the trial court and again obtained an expedited hearing. Judge Giddings thereupon issued a second order canceling the second set of lis pendens and enjoining Mitan VI from recording, "anywhere in the world," any further lis pendens pertaining to the subject properties. The order also enjoined Mitan VI and its agents "from initiating any new actions pertaining to the subject matter of the case in any court of general jurisdiction for forty-five days from July 21, 1994." Additionally, the order

provided that a contempt hearing would be held at a future date and the matter of sanctions for the filing of the second set of lis pendens would be addressed at the contempt hearing.

Two days later, on July 24, 1994, Mitan VI assigned its alleged interest in the shopping centers to Mitan Properties Company, V ("Mitan V"), which is a Michigan limited partnership composed of Keith and Kenneth Mitan as the limited partners and Mitan Doublewood Ancillary Control Section, Inc. ("Mitan, Inc.") as the general partner. On the following day, Monday, July 25, 1994, Mitan V recorded in both Ingham County and Clinton County copies of: (1) the August 7, 1993, purchase agreement between plaintiff and Mitan VI; (2) the above-described assignment from Mitan VI to Mitan V; and (3) an affidavit from Teresa Mitan,[3] an officer of Mitan Inc., attesting to Mitan V's alleged interest in the shopping centers pursuant to the foregoing assignment. These documents, although not containing the label "lis pendens," nonetheless had the same effect of clouding plaintiff's title to the properties in question, thereby impeding plaintiff from consummating its pending transaction with Chemical Bank.

Plaintiff responded to this latest course of events by filing a motion for bond, injunctive relief, contempt and cancellation of the third set of title-clouding documents. Judge Stell, who was now available, scheduled a hearing for August 1, 1994, at 4:00 p.m. on plaintiff's motion.

On August 1, 1994, before the scheduled hearing in Case I, plaintiff commenced the present action in the Ingham Circuit Court against Mitan VI, Mitan V, Mitan Inc., Keith J. Mitan, Kenneth Mitan and Teresa Mitan, alleging slander of title, tortious interference with a business or contractual relationship, and conspiracy to commit slander of title or tortious interference with a business or contractual relationship ("Case II"). The second action was commenced because, following the assignment of interest from Mitan VI to Mitan V, there were now several new participants involved in the matter who were not parties to the action in Case I. The complaint in Case II alleged that the action arose out of the same transaction as that involved in Case I and, consequently, Case II was assigned to Judge Stell. Plaintiff's complaint requested an award of compensatory and exemplary damages, an award of costs and attorney fees under MCL 565.108; MSA 26.1278, an order canceling the latest set of title-clouding documents, and an order adjudging that the Mitan defendants had no right, title or interest in the properties in question.

Just hours before the scheduled hearing in Case I, Mitan VI caused Case I to be removed to federal court. The parties subsequently appeared for the scheduled hearing, but Judge Stell ruled that she no longer had jurisdiction over that case in light of its removal to federal court. However, Judge Stell agreed to entertain a motion for bond or other relief in Case II. Defendant Keith Mitan, an attorney, represented the defendants. Plaintiff's counsel apprised Judge Stell of the previously described history in the matter and informed her that plaintiff was unable to consummate its pending real estate transaction with Chemical Bank because the various title-clouding documents that had been recorded by defendants. Following oral arguments, Judge Stell announced the following decision from the bench:

> The argument that an affidavit of interest, or these latest filings are not the equivalent of a lis pendens is completely without merit[.]
>
> * * *
>
> The Court grants bond in the amount of $38.4 million which is to be filed with the Clerk of this Court no later than 12:00 noon, Wednesday, August 3, 1994.
>
> Since this amount has been under discussion since a week ago Tuesday, I think that there has been ample notice.
>
> I believe *Action Auto [v Anderson*, 165 Mich App 620; 419 NW2d 36 (1988)] does provide for the Court to require a bond to be filed by the filer of a lis pendens or the equivalent to a lis pendens.
>
> The sanction, if the bond is not filed, is that no pleadings may be filed by Defendant Mitan until the bond is filed.
>
> Obviously, that opens the possibility of a motion for summary disposition under MCR 2.116(C)(9).
>
> The Court dismisses any affidavit of interest, any lis pendens or any other document[s] that are currently clouding title to these subject properties.
>
> The Court enjoins any person or legal entity from filing any document that clouds title to the subject properties.

Plaintiff's attorney was directed to prepare an order consistent with Judge Stell's ruling. Judge Stell ordered the parties to appear at 2:00 p.m. the following day, i.e., August 2, 1994, for entry of the order.

As it turned out, Judge Stell was unable to issue an order as contemplated on August 2, 1994, because, shortly before the scheduled hearing, defendants caused Case II to be removed to federal court. On August 4, 1994, however, on plaintiff's motion, the federal court remanded Cases I and II to state court. In doing so, the federal court imposed sanctions against the Mitan litigants on the basis that removal "was instituted for the wholly improper purpose of delaying and impeding both the state court in conducting its business as well as Frandorson in conveying title of the real property to Chemical Bank."

On the following day, August 5, 1994, Judge Stell, having regained jurisdiction over Case II, entered an order providing: (1) that the Mitan defendants were required to post a $38.4 million bond with surety as security for damages and costs, including attorney fees, for which they might be found liable for recording the various title-clouding documents; (2) that defendants were not permitted to file any pleadings "until said bond is filed or until further Order of th[e] Court"; (3) that if defendants failed

to post the required security bond, plaintiff could file a motion for summary disposition pursuant to MCR 2.116(C)(9); (4) that defendants and their agents were enjoined from filing or recording any further documents which cloud or may tend to cloud the title to the properties in question; (5) that all title-clouding documents previously filed were to be canceled and dissolved upon the recording of a certified copy of the court's order; and (6) that a contempt hearing would be scheduled for a future date.

On August 8, 1994, the law firm of Hardig & Parsons entered an appearance in Case II on behalf of each of the Mitan defendants. The following day, August 9, 1994, the Mitan defendants, through their newly retained counsel, once again removed Cases I and II to federal court. The federal court, once again, remanded the cases to the Ingham Circuit Court.[4]

On August 26, 1994, without having posted any security bond as ordered, the Mitan defendants filed an answer to plaintiff's complaint. The answer was signed by defendant Keith Mitan, as attorney for all defendants. The answer was filed against the recommendation of Hardig & Parsons, which subsequently withdrew as legal counsel for the Mitan defendants.

On October 7, 1994, plaintiff moved to strike defendants' answer and sought summary disposition under MCR 2.116(C)(9). The motion alleged that defendants' answer violated the court's August 5, 1994, order, because defendants had not posted a security bond as required by the order. The motion further alleged that, due to defendants' noncompliance with the August 5, 1994, order, defendants could not defend plaintiff's action, thereby entitling plaintiff to summary disposition under MCR 2.116(C)(9). Defendants, through newly retained counsel, responded to the motion by attacking Judge Stell's August 5, 1994, order, arguing that it was unconstitutional and invalid. Defendants also informed Judge Stell that plaintiff had now consummated its real estate transaction with Chemical Bank and, therefore, a bond was no longer necessary.

In a decision from the bench, Judge Stell granted plaintiff's motion, stating:

> Well, I believe that most of the arguments that have been made were made at the time of the original motion, and I reject those arguments at this time.
>
> It's certainly possible that I am wrong, and that one cannot impose a bond as a requirement for a Defendant to file pleadings; but I did address that issue previously. And I still think my ruling was correct.
>
> It does not at all surprise me that Defendant does not agree, and I recognize that Mr. Knowlton is not responsible for the things that occurred in this case before he took over.
>
> However, I do not believe that a party can, by consistently changing lawyers, evade the responsibility of its decisions.

> At the time that I signed that order, Defendants had at least two options. One was a Motion to Reconsider, and the second -- which has to be filed within 14 days -- the second was to go to the Court of Appeals and say, we need immediate relief. This is an absurd ruling, and we ask for immediate consideration.
>
> To wait and do nothing, and then say, oh, by the way, we think this isn't fair, just the way we thought it wasn't fair or constitutional initially, seems to me to be very inappropriate way to be proceeding. And I believe your clients have placed you in an awkward position, Mr. Knowlton.
>
> The Court denied the motion -- or grants the Motion to Strike Answers and Summary Disposition, pursuant to MCR 2.116(C)(9).

An order incorporating Judge Stell's decision was entered on November 28, 1994. Thereafter, on January 10, 1995, the parties stipulated to entry of a consent judgment as to damages only in the amount of $25,000. This appeal followed.

II. *The Bond Order*

Defendants challenge two separate aspects of the trial court's August 5, 1994, order. Defendants argue that the trial court improperly ordered them to post a $38.4 million security bond while simultaneously canceling the title-clouding documents that had been recorded against the properties in question. Additionally, defendants argue that it was improper to preclude them from filing any pleadings as a sanction for not posting a $38.4 million bond, to then strike their answer on the basis that it was filed without a bond having been posted, and to then enter judgment against them for want of a properly filed answer.

A.

We begin by considering whether the trial court could properly require defendants to file a security bond for continuance of the various title-clouding documents.

MCL 600.2731; MSA 27A.2731 authorizes a trial court to order a party who has filed a lis pendens to provide a security bond in an amount sufficient to cover any damages that may be incurred due to the filing of the lis pendens and, upon failure to do so, to cancel the lis pendens. In *Action Auto, Inc v Anderson*, 165 Mich App 620, 628; 419 NW2d 36 (1988), this Court stated that the statute grants the trial court discretion "to require either the applicant to post a bond to cancel the notice of lis pendens *or the person filing the notice of lis pendens to file a bond for continuance of the notice* (emphasis added)."

Although the documents recorded in this case do not contain the label "lis pendens," the trial court determined that they were the functional equivalent of a lis pendens and, accordingly, should be treated as such. Defendants have not challenged this determination. In any event, apart from MCL 600.2731; MSA 27A.2731, in *Altman v City of Lansing*, 115 Mich App 495, 507; 321 NW2d 707

(1982), this Court stated that a lis pendens may be canceled "on equitable principles if in the discretion of the trial judge the benefits of the notice are far outweighed by the damage it causes." Relying on *Altman*, this Court in *Action Auto* observed:

> If a trial court can cancel a notice of lis pendens outright on equitable grounds, it follows that a trial court, as in the present case, can order that the notice of lis pendens be canceled unless the party filing it posts a bond to protect the landowner. 165 Mich App at 629.

Thus, the trial court could legally require a security bond for continuance of the various title-clouding documents filed by defendants. Further, this discretionary authority was not abused in the present case. Defendants' claim of an alleged interest in the subject properties was tenuous at best. The assertion of a tenuous legal theory may be a proper basis for ordering security. *Zapalski v Benton*, 178 Mich App 398, 404; 444 NW2d 171 (1989); *Wells v Fruehauf Corp*, 170 Mich App 326, 337; 428 NW2d 1 (1988). Moreover, plaintiff submitted documentation strongly negating the existence of any legitimate claim of interest. Also, continuance of the title-clouding documents would have impeded the consummation of the pending transaction between plaintiff and Chemical Bank, thereby threatening plaintiff's financial future. This Court has recognized that the need for security is more compelling where, as here, the opposing party stands to be "greatly harmed" by continuance of a lis pendens. *Action Auto, supra* at 629. See also *Altman, supra* (cancellation upheld where the defendants stood to be "greatly harmed" by the filing of a lis pendens and it was "extremely unlikely" that the plaintiffs would ever succeed in their action). The record reflects an outrageous pattern of repeated and deliberate conduct by defendants of evading and circumventing prior court orders, thereby establishing a heightened need for security and protection by plaintiff. On this record, it was not an abuse of discretion to require defendants to post a security bond for continuance of the title-clouding documents.

Defendants argue that, even if the trial court could properly require a security bond for *continuance* of the title-clouding documents, it could not properly order a bond to be posted while *simultaneously canceling* those documents, as was done in this case. Defendants assert that the purpose of a security bond is to protect a landowner from any damages that may be incurred from the continued clouding of title. Accordingly, if all title-clouding documents are canceled, a security bond is no longer necessary.

Even if we agreed with defendants on this point, we are not convinced that relief is warranted on this ground. It is clear from the preceding discussion that cancellation would have been proper if defendants failed to provide a security bond by the date and time ordered for posting bond. It is undisputed that defendants failed to post a bond as ordered. Had defendants done so, and had the trial court then refused to recognize the continued effect of the title-clouding documents, defendants might then have a right to complain. Because defendants did not post a bond, however, they had no right to continuance of the documents beyond the date for posting bond and, therefore, cannot properly complain about any cancellation subsequent to that date. Any claim of relief must therefore be predicated on the alleged premature cancellation of the title-clouding documents, i.e., cancellation

before the date and time for posting bond. Even if we agree that the documents were canceled prematurely, however, we do not believe that relief is warranted absent a showing of prejudice. Here, defendants did not allege below, nor have they alleged on appeal, any prejudice resulting from the alleged premature cancellation of the title-clouding documents. Accordingly, relief is not warranted.

B.

Apart from the issue of cancellation of the title-clouding documents, the August 5, 1994, bond order also provided that if defendants failed to post a security bond as ordered, a "*sanction* shall be and hereby is that Defendants shall not be permitted to file any pleadings until said bond is filed or until further Order of this Court." The trial court subsequently struck defendants' answer, which was filed without a bond being posted, on the basis of this provision. Moreover, the trial court granted summary disposition for plaintiff under MCR 2.116(C)(9) because defendants could not defend the action because they were prohibited from filing an answer for their failure to file a security bond.[5] Defendants contend that the trial court lacked the authority to prohibit them from filing any pleadings as a sanction for not filing bond and, accordingly, improperly struck their answer and rendered judgment in favor of plaintiff on the basis that no bond had been filed. Reluctantly, we agree with defendants on this point.

Plaintiff's complaint, in addition to requesting cancellation of the various title-clouding documents filed by defendants, also requested an award of compensatory and exemplary damages from defendants for their alleged tortious conduct. As discussed previously, MCL 600.2731; MSA 27A.2731 granted the trial court authority to order defendants to file a security bond *for continuance* of the title-clouding documents. Under the statute, however, the only available sanction for failure to file a bond is cancellation of the documents. The statute does not expressly empower the trial court to prohibit defendants from otherwise defending the allegations against them as an additional sanction for failing to post bond. Nor may we imply any such authority for the reason that such a sanction is not necessary to further the objective of the statute, that being to protect a landowner from the continued effects of a lis pendens, inasmuch as cancellation of the lis pendens in the event a bond is not filed will remove the threat of any continued effects.

Defendants correctly observe that the court rule governing motions for security for costs, MCR 2.109(A), is not applicable here, inasmuch as that rule only allows "a party against whom a claim has been asserted" to move for security. In this case, security was being sought by plaintiff, the party asserting a claim. Additionally, security under MCR 2.109(A) may only be granted for "costs and other recoverable expenses that may be awarded by the trial court," *id.*, not to protect a party from damages. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 206 Mich App 570, 584, n 2; 522 NW2d 902 (1994).

Plaintiff asserts that the preclusion provision in the bond order was authorized as "a sanction for the [defendants] prior deceptive and contemptuous conduct." We cannot say that plaintiff's characterization of defendants' prior conduct is inaccurate. We note, however, that no express finding of contempt was ever made and, in fact, the trial court specifically stated in its order that it was "defer[ing] its ruling" on any determination of contempt. In any event, while we recognize that courts

have certain inherent powers to ensure the orderly administration of justice and to enforce compliance with their lawful orders, see e.g., *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 391-392, n 22; 294 NW2d 827 (1980); *Thorne v Carter*, 149 Mich App 90, 93-94; 385 NW2d 738 (1986); *Marquette v Fowlerville*, 114 Mich App 92, 96; 318 NW2d 618 (1982); *American Oil Co v Suhonen*, 71 Mich App 736, 741; 248 NW2d 702 (1976), those powers are limited by the requirements of due process. *Hovey v Elliot*, 167 US 409; 17 S Ct 841; 42 L Ed 215 (1897).

In *Hovey*, a case somewhat similar to this one, the trial court ordered the defendant to pay into the registry of the court a fund that was the subject of the litigation. When the defendant failed to do so, the trial court struck the defendant's answer and entered a default decree for want of an answer. The Supreme Court held that striking the defendant's answer and thereby stripping the defendant of his defenses as punishment for contempt violated due process. *Id.* at 413-414. The decision in *Hovey* was subsequently limited in *Hammond Packing Co v Arkansas*, 212 US 322; 29 S Ct 370; 53 L Ed 530 (1909). In *Hammond*, the Supreme Court held that a state court, consistent with due process, could strike an answer and enter a default against a defendant who refused to produce documents as ordered. The Supreme Court reasoned that, whereas in *Hovey* the defendant was denied his right to defend "as a mere punishment," in *Hammond* the state was merely utilizing a permissible presumption that the refusal to produce material evidence "was but an admission of the want of merit in the asserted defense." *Id.* at 347.

Subsequent cases have continued to recognize the *Hovey* principle that a party should not be deprived of his opportunity to defend for punitive reasons unrelated to the merits of the case. See, e.g., *Phoceene Dous-Marine, SA v US Phosmarine, Inc*, 682 F2d 802, 806 (CA 9, 1982) (default judgment as a sanction for the defendant's deceiving the court as to his availability for trial was inconsistent with the requirements of due process). The *Hovey* rationale has also been applied where a party's failure to comply with a court order is due to inability rather than willfulness, bad faith, or any fault of the disobedient party. See *Societe Internationale Pour Participations Industrielles v Rogers*, 357 US 197, 212; 78 S Ct 1087; 2 L Ed 2d 1255 (1958) (dismissal improper where party was unable to comply with a discovery order due to requirements of foreign law); *United States v Sumitomo Marine & Fire Ins Co*, 617 F2d 1365, 1369 (CA 9, 1980) ("neither dismissal nor preclusion of evidence that is tantamount to dismissal may be imposed when the failure to comply . . . is due to circumstances beyond the disobedient party's control"). See also *Williams v Hofley Mfg Co*, 430 Mich 603, 611-612; 424 NW2d 278 (1988) (recognizing that a defendant's right to due process may be impaired by a procedure that affects the defendant's ability to present a legitimate defense).

In the present case, the preclusion provision prohibiting defendants from filing any pleadings is punitive in nature. Indeed, the order expressly identified the preclusion provision as a "sanction" for failure to post bond. Moreover, the effect of the sanction is to strip defendants of their ability and right to present a defense based on a factor wholly unrelated to the merits of the action. *Hovey*, *supra*. Therefore, this case does not fall within the *Hammond* exception. By precluding defendants from filing any pleadings, the sanction was tantamount to a dismissal and, in fact, formed the basis upon which the trial court subsequently struck defendants' answer and entered judgment in favor of plaintiff. We also observe that the sanction was imposed for the failure to perform an act (providing a $38.4 million bond)

that was not clearly within the defendants' ability to carry out. In all likelihood, it was beyond their ability.[6] Under these circumstances, the sanction of precluding defendants from filing any pleadings for failure to file a bond is impermissible and violates the requirements of due process. Accordingly, it was improper to strike defendants' answer and thereby render judgment in favor of plaintiff on the basis of that sanction. The order striking defendants' answer and granting summary disposition in favor of plaintiff is therefore reversed.

We wish to emphasize that our decision in this case is not based on any determination on our part that defendants did not engage in any improper conduct. Rather, we merely hold that it was inconsistent with due process to foreclose defendants from filing any pleadings as a sanction for failure to post a security bond. That does not mean, however, that defendants may not be appropriately sanctioned for improper or contemptuous conduct. We note that the trial court, in its order of August 5, 1994, deferred ruling on the issues of contempt, or imposition of other appropriate sanctions, pending further proceedings. Although we are not aware whether any proceedings were ever conducted in this regard, if not, we agree that such proceedings would be appropriate in light of the circumstances and history of this case. We are particularly troubled by the conduct and actions of defendant Keith Mitan, who is a licensed attorney, and, in view of such actions, direct the Clerk of Court to refer this case to the Attorney Grievance Commission for possible investigation.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Maura D. Corrigan
/s/ Michael J. Callahan

[1] The subject shopping centers are the Cedar Park Shopping Center in Holt, the Haslett Village Square in Haslett, and the Southpointe Shopping Center in St. Johns.

[2] This Court dismissed the appeal for lack of jurisdiction on September 28, 1994, because the July 19, 1994, order was not a final order appealable as of right (Docket No. 177187). A second claim of appeal from the July 21, 1994, order was likewise dismissed for lack of jurisdiction (Docket No. 177645).

[3] Teresa Mitan is the mother of defendants Keith and Kenneth Mitan.

[4] The lower court record does not contain a copy of the remand decision. Plaintiff asserts that sanctions were again imposed against defendants based on a finding that removal was sought for an improper purpose.

[5] Although the trial court relied on MCR 2.116(C)(9) as the basis for awarding judgment in favor of plaintiff, that court rule applies only where "[t]he opposing party has failed to state a valid defense to the claim asserted against him or her." Such a motion tests the legal sufficiency of pleaded defenses on the

pleadings alone. MCR 2.116(G)(5); *Norgan v American Way Ins Co*, 188 Mich App 158, 160; 469 NW2d 23 (1991). Here, the trial court never assessed the legal sufficiency of any pleaded defenses. Indeed, it struck defendants' answer, thereby precluding consideration of any pleaded defenses. Instead, judgment was rendered on the basis that defendants were prohibited from filing an answer because they failed to file a security bond. In this context, the trial court's judgment was more akin to a default judgment, see MCR 2.603, rather than a judgment based on summary disposition under MCR 2.116(C)(9).

[6] At the November 9, 1994, hearing, defense counsel advised the trial court that there was "no way that [defendants] can post that kind of money."