STATE OF MICHIGAN

COURT OF APPEALS

BARRY R. BESS, Receiver of Certain Real Property of DOUGLAS D. ELLIARD,

Plaintiff-Appellee,

v

WILLIAM J. GREER,

Defendant-Appellant.

UNPUBLISHED
June 2, 1998

No. 200191
Oakland Circuit Court
LC No. 96-524069-CH

Before: Gage, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

In this action to quiet title to real property, defendant appeals by right the order granting summary disposition for plaintiff under MCR 2.116(C)(10). We reverse.

We reject defendant's initial argument that plaintiff did not have standing to bring this action because the Wayne County Probate Court lacked the authority to appoint him as receiver of Elliard's assets. This Court reviews questions of law de novo. *In re Lafayette Towers*, 200 Mich App 269, 273; 503 NW2d 740 (1993). The probate court is a court of limited jurisdiction, deriving all its power from statutes. MCL 600.841; MSA 27A.841; *D'Allessandro v Ely*, 173 Mich App 788, 794; 434 NW2d 662 (1988). In the underlying actions, the probate court had jurisdiction over claims by the representatives of three estates against Elliard to recover the over $100,000 that Elliard misappropriated from the estates.[1] MCL 700.22(1)(a); MSA 27.5022(1)(a); *Noble v McNerney*, 165 Mich App 586, 591-598; 419 NW2d 424 (1988). The court entered money judgments against Elliard in these underlying actions. MCL 600.6104; MSA 27A.6104 grants the court specific powers concerning execution of a judgment. The statute provides in relevant part as follows:

> After judgment for money has been rendered in an action in any court of this state, the judge may, on motion in that action or in a subsequent proceeding:
>
> * * *

(4) Appoint a receiver of any property the judgment debtor has or may thereafter acquire.

Accordingly, upon entering the judgments in the underlying actions, the probate court had authority under MCL 600.6104(4); MSA 27A.6104(4) to appoint plaintiff as the receiver of any property Elliard possessed or thereafter acquired. Therefore, plaintiff had standing to bring the instant action to quiet title to the property.

Defendant next argues that the trial court erred in granting summary disposition for plaintiff under MCR 2.116(C)(10)[2] because a question of fact existed whether Elliard and defendant intended the quitclaim deed Elliard gave to defendant to denote an absolute conveyance or security for a debt. We agree. This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341, 344; 561 NW2d 138 (1997). A motion for summary disposition under MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim and permits summary disposition when, except as to the amount of damages, no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. When deciding the motion, the court considers the pleadings, affidavits, depositions, admissions and other documentary evidence available to it in a light most favorable to the opposing party. *Id.*

In Michigan, a court of equity may declare a deed absolute on its face to be a mortgage. *Ellis v Wayne Real Estate Co*, 357 Mich 115, 118; 97 NW2d 758 (1959); *Taines v Munson*, 19 Mich App 29, 36; 172 NW2d 217 (1969). The controlling factor is the parties' intention. *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). Either the grantor or the grantee may assert the existence of an equitable mortgage. *Kellogg v Northrup*, 115 Mich 327, 328; 73 NW 230 (1897). The person asserting that a deed absolute on its face is actually a mortgage, however, bears a heavy burden of proof and "must furnish a preponderance of evidence whereby it is made 'very clear' to the fact finder that the parties did not contemplate an absolute sale." *Grant v Van Reken*, 71 Mich App 121, 126; 246 NW2d 348 (1976). The court may glean the requisite intent from the circumstances surrounding the transaction, including the conduct and relative economic positions of the parties and the existence of a discrepancy between the value of the property and the price fixed in the alleged sale. *Koenig, supra* at 106; see generally 4 Powell on Real Property, Ch 37, § 37.18, pp 37-117 - 37-120. Michigan courts have identified the debtor/creditor relationship as one where the court will recognize an equitable mortgage because the parties' relative bargaining positions are such that a potential for abuse exists. *Alpert Industries, Inc v Oakland Metal Stamping Co*, 379 Mich 272, 278-279; 150 NW2d 765 (1967). In such cases, the adverse financial condition of the grantor combined with the inadequacy of the purchase price for the property is sufficient to establish that a deed absolute on its face is actually a mortgage. *Koenig, supra* at 106.

In this case, defendant testified at his deposition that Elliard, his friend, gave him the quitclaim deed as security for a debt. Defendant admitted that he did not record the deed, report the property as income, pay property taxes or insurance premiums, and did not occupy the property. The record also reflects a discrepancy between the value of the property and the recited purchase price. Elliard owed defendant between $32,000 and $34,000 for a loan and home improvement services. The estimated true cash value of the property for tax purposes was $46,400, while defendant estimated its worth at in

excess of $140,000. Defendant further testified that Elliard was experiencing financial difficulties at the time he transferred the property. Defendant is bound by this clear and unequivocal testimony, and the trial court appropriately disregarded his contradictory, later-filed affidavit in determining whether an issue of fact existed because parties may not formulate factual issues by asserting contrary facts in an affidavit after giving damaging deposition testimony. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993).

Although we recognize that defendant's deposition testimony supports plaintiff's claim of an equitable mortgage, we nevertheless conclude that a question of fact existed in this case based on Elliard's affidavit. The key factual issue concerns defendant and Elliard's intentions regarding the underlying transaction because the deed itself is not a contract, but rather is the means of carrying out the contract to convey the land. 14 Powell on Real Property, Ch 81A, ¶ 898[1][b], p 81A-46. Elliard stated in his affidavit that he elected to quitclaim the property to defendant rather than prepare a promissory note secured by a mortgage. He further stated that he conveyed the property with no intention of retaining an interest in it. Contrary to plaintiff's assertion, no authority exists for the proposition that the court may disregard Elliard's affidavit because he failed to appear for his scheduled deposition.[3] Rather, a party's recourse against a person who is subpoenaed but fails to appear for his deposition is to initiate contempt proceedings. MCL 600.1701(i)(*v*); MSA 27A.170(i)(*v*); MCR 2.313(B)(1). Moreover, we note that the discovery period in this case had yet to close when plaintiff moved for summary disposition and Elliard prepared his affidavit. Generally, summary disposition is premature if granted before the parties complete discovery on a disputed issue. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Given Elliard's testimony regarding the parties' intentions and the fact that the deed itself represents an absolute conveyance, the trial court erred in granting summary disposition for plaintiff because a question of fact existed whether the parties intended a conveyance or a mortgage.

Reversed.

/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] The underlying probate proceedings were *Estate of Patrick N. Poinsette, deceased*, File No. 88-813-344, *Estate of Mazel Parker Lockard, deceased*, File No. 781,831, and *Estate of Christopher Louis Davis, deceased*, File No. 88-816,096-SE.

[2] Although plaintiff filed his motion under MCR 2.116(C)(7), the trial court considered the motion under the appropriate subrule, (C)(10). We likewise consider plaintiff's motion as if it was properly labeled because no prejudice to defendant is alleged or apparent. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 646 n 1; 360 NW2d 670 (1984).

[3] Plaintiff erroneously cites *Kaufman, supra* at 256-257, to support his assertion that the court may disregard Elliard's affidavit. *Kaufman* states the well established rule that a witness may not contradict

his clear and unequivocal deposition testimony with a later-filed affidavit. This rule does not apply to Elliard's affidavit because he never gave deposition testimony.