

STATE OF MICHIGAN  
COURT OF APPEALS

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

UNPUBLISHED

Plaintiff-Appellee,

v

WILLIAM J. GREER,

No. 200191

Oakland Circuit Court

LC No. 96-524069-CH

Defendant-Appellant.

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

GAGE, J. (concurring in part and dissenting in part):

I concur with the majority that plaintiff had standing to bring the present action. However, I dissent from the majority's conclusion that the circuit court erred in granting summary disposition to plaintiff.

In determining whether to grant a motion for summary disposition, the court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Hottmann v Hottmann*, 226 Mich App 171, 175; 572 NW2d 259 (1997). The controlling factor in finding that a deed absolute is actually an equitable mortgage is the intent of the parties. *Koenig v Van Reken*, 89 Mich App 102, 106; 279 NW2d 590 (1979). This intent may be determined from the circumstances surrounding the transaction which include the conduct and relative economic positions of the parties and the value of the property in relation to the price fixed in the alleged sale. *Id.*

Defendant testified at his deposition that Elliard gave him the quitclaim deed as security for a debt. Defendant admitted that he did not record the deed, report the transfer of the property as income, pay property taxes or insurance premiums, and did not occupy or otherwise use the property. Defendant also testified that the value of the property at the time the deed was delivered was more than \$100,000 while the debt owed was between \$32,000 and \$34,000, and he stated that his friend Elliard was in financial trouble. Although defendant later filed an affidavit contradicting his deposition testimony, the circuit court properly disregarded the affidavit because defendant is bound by his clear

and unequivocal deposition testimony. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993). This testimony supports plaintiff's claim of an equitable mortgage. Indeed, Elliard's adverse financial condition combined with the inadequacy of the alleged purchase price is sufficient evidence to establish that a deed absolute on its face is a mortgage. *Koenig, supra* at 106.

The majority concludes that Elliard's affidavit in which he states that he conveyed the property with no intention to retain an interest in the property creates a question of fact concerning the parties' intention about the transaction in question. I disagree, not because I question the credibility of this disbarred attorney who has been ordered to repay over \$100,000 absconded from several decedent's estates that he represented. I recognize that assessment of credibility is inappropriate when deciding a motion for summary disposition. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). However, giving the benefit of any doubt to defendant as the nonmovant, I do not see how defendant could overcome his clear and unequivocal admission that the deed was conveyed as security for a debt and develop a record at trial that would leave open this very issue. This Court will uphold a grant of summary disposition if we are satisfied that the claim or defense cannot be proved at trial, *Henderson v State Farm Fire & Casualty Co*, 225 Mich App 703, 709; 572 NW2d 216 (1997). Accordingly, I would affirm the circuit court in all respects.

/s/ Hilda R. Gage