STATE OF MICHIGAN

COURT OF APPEALS

TINA LONGSHORE and VICTOR MARTINEZ,

Plaintiffs-Counterdefendants/Appellees,

v

PAN AMERICAN GROWTH PROPERTIES, a Michigan Limited Partnership a/k/a BRENTWOOD APARTMENTS,

Defendant-Counterplaintiff/Appellant.

UNPUBLISHED
July 14, 1998

No. 193994
Wayne Circuit Court
LC No. 95-512489 AV

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

This case arises from defendant's eviction of plaintiffs, month-to-month tenants of the Brentwood Apartments. Following a jury trial, plaintiffs were awarded damages, costs, and attorney fees for wrongful eviction, MCL 600.2918; MSA 27A.2918, and violations of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.;* MSA 19.418(1) *et seq.*, and defendant was awarded damages for its counterclaim for nonpayment of rent. The circuit court affirmed the verdict and awards, and this Court granted defendant leave to appeal. We affirm in part, and reverse and remand in part.

First, defendant argues that because it acted pursuant to a court-authorized writ of restitution, the trial court should have granted its motion for a directed verdict and the jury's verdict of wrongful eviction was not supported by sufficient evidence. Defendant relies upon MCL 600.2918(3)(a); MSA 27A.2918(3)(a), which shields a lessor from liability for unlawful interference if the lessor acted "pursuant to court order." We review de novo the denial of a motion for a directed verdict. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). When evaluating a motion for a directed verdict, a court must consider the evidence in the light most favorable to the nonmoving party, drawing all reasonable inferences in favor of the nonmoving party. *Id.* Similarly, when reviewing the sufficiency of the evidence in a civil action, this Court views the evidence in the light most favorable to the plaintiff and gives the plaintiff the benefit of every reasonable inference that can be drawn from the evidence. *Mull v Equitable Life Assurance*, 196 Mich App 411, 421; 493 NW2d 447 (1992).

Regarding plaintiff Longshore, defendant's argument fails for the simple reason that no court order individually named Longshore. The demand for possession, the complaint and summons, and the writ of restitution were addressed to plaintiff Martinez alone. A judgment to evict and its accompanying writ apply only to the adult individual named because proper service of process is required to confer personal jurisdiction over a party. MCR 2.105. See generally *Deroshia v Union Terminal Piers*, 151 Mich App 715; 391 NW2d 458 (1986). Any other lessee of whom the lessor has knowledge or should have knowledge is not included if that lessee is not named in the document. See, e.g., *H & L Heating Co v Bryn Mawr Apartments of Ypsilanti, Ltd*, 97 Mich App 496, 501-503; 296 NW2d 354 (1980). Thus, no court order permitted defendant to evict plaintiff Longshore, and defendant has no claim to the protection afforded by MCL 600.2918(3)(a); MSA 27A.2918(3)(a). We hold that the trial court reached the right result in denying defendant's motion regarding plaintiff Longshore and that there was sufficient evidence to support the jury's verdict that defendant wrongfully evicted plaintiff Longshore.

In contrast, defendant may claim the protection afforded by MCL 600.2918(3)(a); MSA 27A.2918(3)(a) regarding plaintiff Martinez. Plaintiffs argue that defendant should not be shielded from liability because defendant obtained its court order by fraudulently representing to the district court that plaintiffs had made no payments on the judgment when, in fact, plaintiffs had paid the rent due for the months of May through August before the writ of restitution in this case issued. However, plaintiffs do not dispute that a portion of the judgment for court costs remained due because of a check returned for insufficient funds.

Even assuming arguendo that fraudulently obtaining a writ of restitution abrogates the protection of that court order, the facts of this case do not support plaintiffs' contention that defendant fraudulently obtained the court order to recover possession of the premises. The judgment against Martinez indicated that partial payment of the total amount due would not prevent issuance of the writ of restitution; therefore, defendant was entitled to issuance of the writ of restitution whether defendant represented that plaintiffs continued to owe the total amount due or whether defendant represented that plaintiffs owed only court costs. We reverse the trial court's denial of defendant's motion for a directed verdict regarding plaintiff Martinez and hold that there was insufficient evidence to support the jury's verdict that defendant wrongfully evicted plaintiff Martinez.

Next, defendant argues that the evidence was insufficient to establish that defendant violated the MCPA in the two ways alleged by plaintiffs. Defendant first argues that even if its agent informed Longshore that she would report Longshore's payments to the district court judge and that "everything would be taken care of," the misrepresentations would not constitute a violation of the MCPA in this case because defendant's agent had not communicated with Martinez. See MCL 445.903(n), (s), (bb), or (cc); MSA 19.418(3)(n), (s), (bb), or (cc). However, plaintiffs presented evidence that Longshore acted as Martinez' agent and that defendant's agent was aware that Longshore acted on behalf of herself and Martinez. See, e.g., *Sudworth v Morton*, 137 Mich 575, 577; 100 NW 769 (1904). Therefore, when viewed in the light most favorable to plaintiffs, the evidence was sufficient to support the finding that the misrepresentations of defendant's agent to Longshore violated the MCPA in this case.

Defendant also argues that because plaintiffs did not produce evidence that they had paid a security deposit, there was insufficient evidence to support the jury's finding that defendant failed to refund plaintiffs' security deposit in violation of MCL 445.903(u); MSA 19.418(u). At trial, plaintiffs testified that they had paid a security deposit when they signed the original lease and pointed out a provision of the lease that states that a security deposit "will be held by the landlord." This evidence, and every reasonable inference drawn from it, was sufficient to support the jury's finding that defendant violated the MCPA by failing to refund the security deposit.

We note that plaintiff Martinez' award of damages presents special problems because the jury awarded him a lump sum for damages for the unlawful ejectment pursuant to MCL 600.2918; MSA 27A.2918, which we reverse, and the violations of the MCPA, which we affirm. Because the award fails to distinguish between the two counts and the record reveals no rational basis for apportionment, we must remand this case to the trial court for a new trial on the issue of plaintiff Martinez' damages.[1] See *Miracle Boot Puller Co, Ltd v Plastray Corp*, 84 Mich App 118, 123; 269 NW2d 496 (1978).

Last, defendant argues that the trial court erred in allowing plaintiffs to read into the record the former testimony of defendant's agent because plaintiffs did not use due diligence in their efforts to obtain the agent's presence at trial. See MRE 804(a)(5). The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). Here, defendant named its agent on its witness list, although neither party knew the agent's whereabouts. Moreover, plaintiffs, not defendant, exerted efforts to locate the witness that were reasonable under the circumstances. Therefore, we hold that the trial court did not abuse its discretion in admitting at trial the former testimony of defendant's agent.

Affirmed in part, and reversed and remanded in part.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.

[1] Although our review of the record presented has not revealed a rational basis upon which we could base apportionment of the verdict, the trial court is not precluded from performing apportionment rather than holding a new trial in the event that there is a rational basis of which we are not aware.