STATE OF MICHIGAN

COURT OF APPEALS

KENDALL MANOR ASSOCIATES,

Plaintiff-Appellee,

v

KENDALL FOREST, LTD.,

Defendant-Appellant.

UNPUBLISHED
December 28, 1999

No. 212231
Kalamazoo Circuit Court
LC No. 89-001752 CK

Before: Murphy, P.J., and Hood and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order of dismissal for lack of progress. We hold that defendant comes before us with unclean hands, and we deny the relief requested by defendant based on the exercise of our equitable powers. Having denied defendant's relief based on this doctrine, it is unnecessary for us to decide defendant's issues on appeal.

On September 25, 1986, plaintiff and defendant entered into a land contract for the sale of a group of apartments in Kalamazoo, Michigan. Defendant thereafter engaged in a pattern of failing to make timely payments pursuant to the land contract. On September 28, 1988, plaintiff sent a forfeiture notice to defendant because it had failed to make the September 1 payment, had failed to pay late fees and had failed to make a tax escrow payment. Apparently, defendant cured this default in a timely manner. On October 25, 1988, plaintiff again sent a notice of default and foreclosure to defendant because it had failed to make the October 1 payment and failed to bring the tax escrow current. Apparently, defendant also cured this default in a timely manner. The method by which defendant cured each of these defaults is not evident from the record.

On June 16, 1989, plaintiff again sent notice of default and foreclosure to plaintiff because it had failed to make the June 1 payment. The notice clearly indicated that, in addition to the land contract amount, $6,455.16 was owed to make the tax escrow current and an additional $4,837.88 was owed for the June 1989 tax and insurance escrow payment. The foreclosure notice stated:

> If this default continues for a period of fifteen (15) days after the date upon which this Notice of Foreclosure is served, the Seller under the Land Contract identified

> above will, without further notice, declare the entire balance due and payable, and proceed to Foreclosure according to the common law and the Statutes of the State of Michigan in such case made and provided.

The land contract, itself, contained a similar provision.

The foreclosure notice was sent via certified mail on June 16, 1989, and was received by defendant's agent on June 23, 1989. Sometime after July 4, 1989, which was not within the fifteen day period, plaintiff received a partial payment of the amount due pursuant to the notice of default. Plaintiff rejected the partial payment as untimely and incomplete. On July 5, 1989, plaintiff filed suit to accelerate the balance due on the land contract and, in the event that the balance was not paid, to foreclose. Defendant answered and asserted that its payment to cure the default was timely because it was placed in the mail on the fifteenth day, July 1, 1989. Defendant also filed a counterclaim alleging breach of express and implied warranties based on claimed latent defects in the property at the time of the sale.

Plaintiff moved for summary disposition on its claims pursuant to MCR 2.116(C)(9) and (10) and moved for summary disposition on defendant's counterclaim pursuant to (C)(10).[1] In May 1990, prior to entry of an order on the summary disposition motion, plaintiff moved the trial court for immediate possession of the property based on the terms of the land contract and on equitable considerations, including the belief that defendant was wasting the property. On June 4, 1989, after numerous briefs were filed on issues relating to summary disposition and plaintiff's possession and, after several hearings were held, the trial court entered an order granting plaintiff summary disposition on its claims, denying plaintiff summary disposition on defendant's counterclaim, and ordering defendant to surrender immediate possession of the premises to plaintiff. The trial court also entered a judgment of foreclosure.

On July 25, 1990, defendant filed a claim of appeal in this Court from the June 4, 1990 order and the June 4, 1990 judgment of foreclosure. While the appeal was pending, plaintiff arranged for the foreclosure sale. The sale was postponed because defendant filed for bankruptcy two weeks before the scheduled sale date and an automatic stay was entered. Eventually, however, the bankruptcy stay was lifted in order to allow the foreclosure sale to proceed. The sale took place on September 19, 1990, even though defendant had objected on procedural grounds. Plaintiff's subsequent motion to confirm the sale was granted by the trial court on February 28, 1991.

On August 30, 1991, this Court dismissed defendant's June 25, 1990, claim of appeal for lack of jurisdiction:

> The Court orders that the motion to dismiss is GRANTED and the claim of appeal is DISMISSED for lack of jurisdiction. The order appealed from is not a final order because it did not dispose of defendant-appellant's counterclaims. [*Kendall Manor Assoc v Kendall Forest Ltd*, unpublished order of the Court of Appeals, entered September 6, 1991 (Docket No 130245).]

Defendant took no further action to prosecute its counterclaim or secure a final order from the trial court. On September 29, 1997, the trial court issued a form notice of dismissal for lack of progress. Defendant did not try to remove the action from the no progress docket at that time. Instead, on May 4, 1998, at a show cause hearing, defendant agreed to a voluntary dismissal of the counterclaim. After the order of dismissal was entered, defendant filed this appeal. In its appeal, defendant argues numerous errors stemming from the June 4, 1990, order, the June 4, 1990, judgment of foreclosure, and the February 28, 1991, order confirming the foreclosure sale.

Plaintiff urges this Court to reject the appeal based on the equitable doctrine of laches. This Court has equitable power to fashion a remedy appropriate to the circumstances presented before it. Const 1963, art 6, § 10 provides:

> The jurisdiction of the court of appeals shall be provided by law and the practice and procedure therein shall be prescribed by the rules of the supreme court.

MCL 600.310; MSA 27A.310 provides:

> The court of appeals has original jurisdiction to issue prerogative and remedial writs or orders as provided by rules of the supreme court, and has authority to issue any writs, directives and mandates that it judges necessary and expedient to effectuate its determination of cases brought before it.

MCR 7.216(A)(7) provides:

> (A) The Court of Appeals may, at any time, in addition to its general powers, in its discretion, and on the terms it deems just:
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> * * *
>
> (7) enter any judgment or order or grant further or different relief as the case may require.

Although we have equitable powers, it does not extend to sua sponte application of the doctrine of laches. *American Electrical Steel, Co v Scarpace*, 399 Mich 306, 309; 249 NW2d 70 (1976). However, we may apply the clean hands maxim sua sponte. In *Stachnik v Winkel*, 394 Mich 375, 382-383; 230 NW2d 529 (1975), the Supreme Court set forth the rationale behind application of the maxim:

> The clean hands maxim is an integral part of any action in equity. The United States Supreme Court captured the essence of the maxim when it said:
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> "[The clean hands maxim] is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of the court of equity as a vehicle for

> affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v Heath*, 6 How [47 US] 228, 247 [12 LEd 416 (1848)]." *Precision Instrument Manufacturing Co v Automotive Maintenance Machinery Co*, 324 US 806, 814; 65 SCt 993, 997; 89 LEd 1381 (1944).
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> Since the clean hands maxim is designed to preserve the integrity of the judiciary, courts may apply it on their own motion even though it has not been raised by the parties or the courts below. See *Gaudiosi v Mellon*, 269 F2d 873, 881- 882 (CA 3, 1959). See also *Hall v Wright*, 240 F2d 787, 795 (CA 9, 1957); *Frank Adam Electric Co v Westinghouse Electric & Mfg Co*, 146 F2d 165, 167 (CA 8, 1945).
>
> This Court reviews equity actions *de novo*. To suggest, as the Court of Appeals below has done, that we may not consider whether the plaintiffs come before us with clean hands simply because neither the parties nor the judge in the circuit court raised the issue below would be contrary to the very rationale behind the creation of the clean hands maxim.

In *Stachnick, supra*, the plaintiffs entered into an agreement for the sale of property with the defendants. The plaintiffs represented that they were acting on behalf of a lumber corporation. After executing the agreement for sale, the defendants entered into an agreement with neighboring property owners for whom the plaintiffs were working. The plaintiffs filed suit to compel the defendants' conveyance of the disputed property. The Supreme Court declined to examine the merits of the plaintiffs' issues on appeal and noted that the application of the clean hands maxim was not contingent upon a finding of fraud:

> To invoke the clean hands maxim
>
> "one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient to cause for the invocation of the maxim by the chancellor." [*Stachnik, supra* quoting *Precision Instrument, supra*.]

In the present, defendant's actions indicate that it comes before us with unclean hands. When plaintiff sought to foreclose on the land contract, defendant filed a counterclaim. On December 15, 1989, plaintiff obtained summary disposition on its original complaint. The trial court, however, held any decision regarding the counterclaim in abeyance. Specifically, the trial court gave defendant a three week period to file additional pleadings related to the propriety of the counterclaim. Defendant did file additional pleadings which did not address the counterclaim, but rather, addressed the propriety of granting plaintiff's motion for summary disposition. The trial court did not hear oral arguments regarding defendant's pleadings, holding that the filing constituted a motion for reconsideration of the grant of summary disposition.

On June 4, 1990, the trial court entered orders granting summary disposition to plaintiff for its original complaint, denying plaintiff's motion for summary disposition of the counterclaim, and ordered defendant to surrender possession of the property. A judgment of foreclosure in the amount of $1,102,003.38 entered, which was the principal amount due on the land contract, plus interest and taxes. As previously noted, defendant filed a claim of appeal from this order, which was dismissed due to lack of jurisdiction. Defendant declared bankruptcy, but plaintiff successfully had the bankruptcy stay lifted in order to hold the foreclosure sale. Plaintiff purchased the property at the foreclosure sale, and the trial court confirmed the sale by order dated February 28, 1991.

Despite the resolution of plaintiff's complaint in 1990 and post-judgment orders confirming the sale in 1991, defendant took no action to pursue its counterclaim *for six years*. The only action taken to close the case was a form notice of dismissal for lack of progress which issued by the trial court on September 29, 1997. Defendant did not take any action to revive its counterclaim and did not offer an explanation for the lack of progress. On April 7, 1998, the trial court issued an order to show cause why the case should not be dismissed. On May 4, 1998, the parties appeared and agreed to a voluntary dismissal of the counterclaim. On May 18, 1998, the order of dismissal entered. Thereafter, defendant filed this claim of appeal from the May 18, 1998 order, the June 4, 1990 order, the June 4, 1990 judgment of foreclosure, and the February 28, 1991 order confirming the foreclosure sale. However, the issues on appeal relate solely to the trial court's rulings in 1990 and 1991.

Although defendant represented to the trial court that it had a meritorious position in its counterclaim, defendant took no action to pursue or prove the allegations contained therein. Rather, the record indicates that the outstanding counterclaim was merely a means of delaying final resolution of the case in favor of plaintiff. When defendant was given the opportunity to file pleadings addressing the merits of its counterclaim, it instead filed a motion for reconsideration of the order granting summary disposition in favor of plaintiff. Defendant's declaration of bankruptcy would have precluded plaintiff from obtaining necessary relief, but plaintiff was able to have the stay lifted. Once the trial court approved the foreclosure sale to plaintiff, defendant took no action to pursue its counterclaim or dismiss the matter such that a final order appealable as of right would enter. Defendant was given notice of the lack of progress on its counterclaim, but again, no action was taken to pursue the merits of the counterclaim. Only after receiving notice of the order to show cause was there action taken by defendant, and this action was the mere procedural consent to dismiss the counterclaim. Meanwhile, plaintiff asserts that it has taken action to improve the disputed property and a sale is pending on the property, which has doubled in value. Defendant's actions, or rather inaction, reveals that it does not come before this Court with clean hands. Based on our equitable powers, we reject defendant's appeal, not on the merits of its issues on appeal, which we nevertheless find lacking in every respect, but on the clean hands maxim. *Stachnik, supra*.

Affirmed for the reasons stated above.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] Plaintiff later amended its motion and moved for summary disposition on the counterclaim pursuant to MCR 2.116(C)(8) as well as (C)(10).