

STATE OF MICHIGAN
COURT OF APPEALS

JAMES DROLETT, GAIL DROLETT, and
DOROTHY SPROUT, Personal Representative of
the Estate of JOHN SPROUT, deceased,

UNPUBLISHED
September 3, 2002

Plaintiffs-Counterdefendants-
Appellants,

v

No. 230680
Washtenaw Circuit Court
LC No. 99-005313-NZ

JOSEPH P. BOLTACH,

Defendant,

and

NORTH LAKE INVESTMENTS, LLC,

Defendant-Counterplaintiff-Third
Party Plaintiff-Appellee,

and

STEWART TITLE GUARANTY COMPANY,

Third Party Defendant-Appellee,

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's orders granting summary disposition in favor of North Lake Investments, LLC, under MCR 2.116(C)(10), and denying plaintiffs' motion to enter a default judgment against defendant Joseph Boltach. We reverse in part, affirm in part, and remand for further proceedings.

In January 1999, plaintiffs obtained a judgment against Joseph Boltach in the amount of \$164,970.56 in their defamation action against him. Plaintiffs were unable to collect the judgment and instituted the present suit on September 8, 1999, seeking to set aside a conveyance

made by Joseph Boltach and his wife, Anita Boltach, to North Lake under the terms of a land contract.¹ Plaintiffs allege that the conveyance was fraudulent under MCL 566.221. The property is located in Dexter Township and the purchase price was for \$325,000. Under the terms of the land contract, dated January 21, 1998, North Lake made a down payment of \$90,000, and the balance was to be paid at a rate of \$3,450 a month for five years at 8 ½ percent interest. A memorandum of land contract was recorded with the Washtenaw County Register of Deeds on February 20, 1998. In October 1998, North Lake obtained a mortgage loan, paid off the balance of the land contract, and received a warranty deed for the property.

North Lake moved for partial summary disposition and the hearing was held on January 19, 2000. North Lake contended, among other things, that it was entitled to summary disposition because the property had been held by the Boltaches as tenants by the entireties and, therefore, could not have been attached by plaintiffs regardless of any conveyance. The trial court agreed with North Lake and ruled:

[A]s a matter of law, there is no issue of material fact as to the title of the property being in the names of both Joseph Boltach and his wife as tenants by the entirety.

And, thus, as a matter of law, the property would not have been attachable by the creditor; and, thus, any conveyance by the Boltaches as husband and wife to a third party could not constitute a fraudulent conveyance.

On appeal, plaintiffs first contend that the trial court erred in granting summary disposition in favor of North Lake. Plaintiffs argue that there are factual issues concerning whether the conveyance was fraudulent, that it is disputed whether Mr. and Mrs. Boltach owned the property as tenants by the entireties, and that even if the property was owned as tenants by the entireties, the conveyance could still be voided as fraudulent. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is subject to de novo review. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 537; 620 NW2d 836 (2001).

We conclude that the trial court erred in granting summary disposition under MCR 2.116(C)(10) for the reason that plaintiffs could not attach Mr. Boltach's property because it was held by him and his wife as tenants by the entireties. First, we note that it is not at all clear that the property was held as tenants by the entireties. No deed is in the lower court record, nor has any discovery been conducted by the parties. The land contract merely states that the contract was made between "Joseph P. Boltach, Jr. and Anita Boltach, Husband and Wife" and North Lake. The land contract does not specify how Mr. and Mrs. Boltach held the property. Although

¹ North Lake filed a counterclaim against plaintiffs on November 24, 1999, alleging that a lis pendens filed by plaintiffs against the property was without lawful cause, was done with the intent to harass, and slandered title of the property. North Lake also filed a third party complaint against Stewart Title on December 3, 1999, alleging breach of the title insurance policy issued by Stewart Title by refusing to defend and provide coverage for North Lake. The counterclaim was dismissed by stipulation of the parties with prejudice on October 10, 2000, and the third party claim was dismissed without prejudice in the same order. This appeal only concerns the complaint filed by plaintiffs against North Lake.

there is a presumption in the law that a conveyance to a husband and wife creates a tenancy by the entireties, the deed may explicitly state a different kind of tenancy to be created. See *DeYoung v Mesler*, 373 Mich 499, 504; 130 NW2d 38 (1964). Here, North Lake has not proven how Mr. and Mrs. Boltach held title to the property and, therefore, has not properly supported its motion under MCR 2.116(C)(10). MCR 2.116(G)(3)(b) mandates that affidavits, depositions, admissions or other documentary evidence in support of the grounds asserted in the motion are *required* when summary judgment is sought under MCR 2.116(C)(10). Therefore, North Lake did not meet its burden of proving its motion under MCR 2.116(C)(10).

Moreover, even if Mr. and Mrs. Boltach held the property as tenants by the entireties, the trial court erred in granting summary disposition for North Lake as a matter of law. As a general proposition, property held as a tenancy by the entireties is not liable for the individual debts of either party. 1 Cameron, Michigan Real Property Law (2d ed), § 9.16, p 315, citing *Rossmann v Hutchinson*, 289 Mich 577; 286 NW 835 (1939); *Kolakowski v Cyman*, 285 Mich 585; 281 NW 332 (1938); *Sanford v Bertrau*, 204 Mich 244; 169 NW 880 (1918). However, there is an exception to this rule that creditors of one party may reach property held as a tenancy by the entireties in the case of fraud. 1 Cameron, *supra*, p 316; see also, *Cross v Wagenmaker*, 329 Mich 100, 105; 44 NW2d 888 (1950); *Dunn v Minnema*, 323 Mich 687, 694; 36 NW2d 182 (1949). Here, plaintiffs allege that Mr. Boltach fraudulently conveyed the property under MCL 566.221; consequently, even if the property was held by the Boltaches as tenants by the entireties, plaintiffs could still reach the property where fraud is alleged.

Accordingly, the trial court erred in granting summary disposition to North Lake under MCR 2.116(C)(10).

To the extent that North Lake argues that the trial court should be affirmed on the alternative basis that plaintiffs failed to state a cause of action for a fraudulent conveyance in their complaint, we decline to address this argument because it was not presented in the trial court. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). However, North Lake is free to pursue this argument on remand. Further, North Lake has alluded to a defense that it was a bona fide buyer, paid fair consideration for the property, and had no notice of the lawsuit between plaintiffs and Mr. Boltach. See MCL 566.225. Because the trial court did not address this issue and no discovery has been conducted, we cannot properly address the merits, but again note that North Lake is free to pursue a motion for summary disposition alleging this defense on remand. Additionally, North Lake contends that plaintiffs' claim is barred by laches because they did not timely proceed under MCL 566.37. Because this issue was not addressed by the trial court, we will not consider it, and note that the trial court may rule on it on remand.

Lastly, plaintiffs argue that the trial court erred when it denied their motion to enter a default declaratory judgment against defendant Joseph Boltach. An order of default was entered on December 28, 1999, as to Mr. Boltach. At the hearing held on March 1, 2000, the trial court stated that it would enter a default judgment providing for money damages, but that it would not enter a default judgment declaring that the conveyance of real estate was void as to Joseph Boltach. Ultimately, the order denying plaintiffs' motion for entry of default judgment was entered on May 17, 2000.

We find no error in the trial court's refusal to award a default declaratory judgment in favor of plaintiffs by refusing to declare that the conveyance was void as to Joseph Boltach. Such a judgment would have adversely impacted North Lake's claim for the property. However, North Lake was not in default and North Lake has no control over the defaulted party, Joseph Boltach. Because North Lake has timely defended against plaintiffs' claim of fraudulent conveyance, the trial court properly declined to enter a default declaratory judgment addressing this issue. Whether the conveyance was fraudulent is a matter that will have to be pursued on remand.

Reversed in part, affirmed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen