STATE OF MICHIGAN

COURT OF APPEALS

STANDARD FEDERAL BANK, N.A., Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 16, 2006
v	No. 266053 Wayne Circuit Court
LAWRENCE KORN, Defendant/Counter-Plaintiff-Appellant.	LC No. 05-517910-CH

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right the circuit court's grant of plaintiff's motion for summary disposition; the underlying action involves a claim brought by plaintiff seeking a deficiency judgment after foreclosure of a mortgage, and a counter-claim brought by defendant seeking a declaration that he might remove certain trees and fencing from the property that is the subject of the foreclosure. We affirm.

I. Facts and Procedural History

Plaintiff Bank[1] holds a fully advanced Equity Line of Credit Agreement in the amount of one hundred thousand dollars secured by a mortgage on real property owned by defendant Korn. These documents were executed on May 28, 2004. Korn defaulted and the Bank started proceedings to foreclose the mortgage. On April 27, 2005, the Bank was the successful bidder at the foreclosure sale; a Sheriff Deed transferred ownership of the property to the Bank subject to Korn's right of redemption. The Bank has also redeemed Korn's first mortgage, the senior lien, from Republic Bank.

On June 16, 2005, the Bank filed a claim in Wayne County Circuit Court seeking a deficiency judgment against Korn and filed a motion for a temporary restraining order to prevent Korn from removing trees and fencing from the property; Korn replied and filed a counter-claim

[1] Formerly Standard Federal, now LaSalle Bank.

seeking partition and a declaration permitting him to remove trees and fencing from the property. Korn argued that valuable trees and fencing had been added to the property after the appraisal required to secure the mortgage, and that he should therefore be able to remove these items without affecting the value of the property as reflected in that appraisal.

On July 22, 2005, the court entered an order of Consent Injunctive Relief. The parties stipulated consent to an order prohibiting Korn from removing the trees and fences at issue, as such action would impair the value of the property, but permitting Korn to "exercise his rights to market the aforesaid land, trees, and property, pursuant to his rights to redeem said property."[2] The order further stated that any proposed sale had to be approved by the court.

On August 10, 2005, plaintiff filed a motion for summary disposition, and a hearing on the motion was held on September 9, 2005. During the hearing, Korn's attorney argued that "fraud is a defense in a foreclosure action," and that "with regard to the particular contract and what the parties understood relative to this transaction is inconsistent with the facts that [Bank's counsel] has cited in [its] brief." (TR 9/9/05, p11) The trial judge responded that "If you're going to plead fraud, you have to plead it with particularity. . . . You have to have something in your complaint that there's allegations of fraud here. I'm not hearing anything." (TR 9/9/05, p11) Korn's counsel further argued that "[t]he cases cited by [Bank's counsel] go back to the turn of the century," to which the trial judge replied, "[t]he law doesn't change much in this area." (TR 9/9/05, p11) As to Korn's argument that ownership of the trees and the fence need not pass with ownership of the property, the trial judge said simply, "[y]ou don't own them anymore, and you better not touch them." (TR 9/9/05, p12) Korn requested he be allowed to amend his complaint, and the trial judge denied the request and granted the Bank's motion for summary disposition. (TR 9/9/05, p13)

On September 30, 2005, the court entered an order granting plaintiff's motion, dismissing defendant's counter-complaint with prejudice, and ordering

> that judgment for the deficiency owed to Bank in connection with the Loan be and the same is hereby entered in favor of Bank and against Lawrence Korn in the amount, as of August 10, 2005, of Thirty-Nine Thousand Four Hundred Eighteen and 50/100 Dollars ($39,418.50) representing principal, interest and late charges, plus the further amount of Seven Thousand Eight Hundred Eighty-Three and 35/100 Dollars ($7,883.35) representing attorney fees and costs, for a total judgment, as of August 10, 2005, of Forth-Seven Thousand Three Hundred One and 85/100 Dollars ($47,301.85) plus the cost of enforcement thereof, including but not limited to reasonable attorney fees, together with statutory interest at the rate of 9.0% per annum and costs accruing thereon.

Defendant filed this appeal.

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[2] The redemption period would run out on October 27, 2005. (TR 9/9/05, p4)

II. Standard of Review

Plaintiff brought its summary disposition motion under MCR 2.116(C)(8) and MCR 2.116(C)(10). We review de novo the grant or denial of a motion for summary disposition. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(8) relies only on the pleadings, taking all factual allegations as true, and testing the legal sufficiency of the claim; summary disposition is proper where no factual development could support relief under the claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim, relying on pleadings, affidavits, depositions, and other documentary evidence; summary disposition is proper only where no genuine issue of material fact exists. *Id.* at 120.

III. The Deficiency Judgment

Defendant first argues on appeal that the trial court erred in granting plaintiff's motion for summary disposition on the claim of deficiency judgment. Defendant states that plaintiff's claim for a deficiency judgment was supported by an affidavit of Sandra Gearring, an employee of the Bank, and that Gearring failed to appear for a scheduled deposition. Plaintiff responds that defendant has failed to show how additional discovery could help him meet his burden. We agree that defendant has failed to support the argument that additional discovery will support his claim: "a party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Michigan Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993) (citation omitted). Defendant has provided nothing beyond his own affidavit to support his claim that the amount of damages due the Bank is in dispute.[3]

Defendant also argues that the deposition testimony of Cynthia Price, a First Vice President of the Bank, "lacked substance." Ms. Price was involved in the application process for the loan at issue, but admitted she had no knowledge of events after the loan closed. However, as plaintiff correctly points out, defendant specifically noticed the deposition of Ms. Price rather than requesting, as defendant could have done, the deposition of a bank employee with specific knowledge to answer defendant's particular questions. Defendant argues that "Plaintiff's Counsel has not been forthcoming in providing discovery." We fail to see how the taking of this specifically requested deposition supports defendant's claim, even though the witness defendant noticed lacked the knowledge defendant sought.

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[3] We add that the other depositions taken by defendant are of marginal or no relevance. Defendant deposed his neighbors, who are not parties to this action and have no information relevant to any issues in this litigation. Defendant deposed two sellers and one installer of the trees he added to his property, and while these persons could and did testify to the value of the trees, the value of the trees is not at issue, the two legal issues being how much defendant owes plaintiff in deficiency after the foreclosure proceedings, and whether the trees and fence are permanent accessions to the realty.

Defendant also argues, irrelevantly, that his neighbors Stuart and Camille Busse "intended to interfere with the contractual relations between Plaintiff and Defendant." Defendant has not explained how this interference supports his claim that the trial court erred in granting plaintiff's motion for summary disposition as to the deficiency judgment. We cannot imagine what legal or logical argument defendant possibly could make in that regard, but since he has made none, there is nothing before us to address.

Defendant has failed to make any legal argument that might support his claim that the trial court erred in granting summary disposition as to the deficiency judgment. Plaintiff, however, has made a valid legal argument in support of the trial court's decision:

> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996) (citations omitted).

It is undisputed that plaintiff and defendant were bound by a loan agreement, that defendant defaulted, and that plaintiff declared the entire amount due.[4] It is a matter of record that plaintiff commenced foreclosure proceedings and bid successfully on the property at the sheriff's sale. We find that defendant's liability for any deficiency is also undisputable. We further find that plaintiff met its initial burden as to the amount of damages owing by submitting the affidavit of Gearring, a Bank employee. Defendant submitted no evidence to refute plaintiff's evidence, but instead relied on the statements he had made in his answer to plaintiff's complaint, and his own affidavit attached to that answer, which is simply insufficient to oppose a motion for summary disposition: "the nonmoving party may not rely on mere allegations or denials in pleadings." *Quinto*, *supra*.

IV. Ownership of the Trees and Fence

Defendant argues on appeal that the trial court's summary dismissal of defendant's counter-claim for a declaration of right to partition and sell certain trees and fencing on the real property was error. Defendant argues that this Court may apply equitable remedies to grant ownership of the trees and fencing to defendant. While equitable remedies are certainly within this Court's discretion, we disagree that they may or should be applied in this case.

We note first that defendant's argument that removal of the trees and fencing will not affect the market value of the real property, based on deposition testimony of a real estate agent

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[4] Plaintiff's complaint alleges and defendant's reply admits these statements.

and a property appraiser,[5] is irrelevant. The mortgage document executed by the parties provides: "Grantor mortgages and warrants to Lender all of Grantor's right, title, and interest in and to the following described real property, together with all existing or subsequently erected or affixed buildings, improvements and fixtures . . . and all other rights, royalties, and profits relating to the real property." Irrespective of whether improvements made to the property affect the value of the property, nonetheless they are folded into the collateral mortgaged to secure the equity line of credit.[6]

Defendant argues that trees may be considered personal property rather than part of the real property on which they grow, citing *Groth v Stillson,* 20 Mich App 704, 174 NW2d 596 (1969).[7] Defendant fails to add that in that case, more than a year prior to selling the real property at issue, the owner had sold to a third party "the right of entry to spray, prune, care for, harvest and remove the trees until all saleable trees reached their proper growth and were harvested" or that "[t]he trial court found defendants had notice of the sale of the trees to third parties prior to their deed." At 705-706.

The Bank relies on a century old case, *Delaney v Manshum*, 146 Mich 525, 528 (1906) for the proposition that "[g]rowing trees are as much a part of the realty as the soil in which they grow." We agree.

Defendant also argues, with no cite to authority, that the fencing is "easily removed . . . and capable of severance." We find that there is authority on point "There can be no claim that fence-rails are of necessity part of the realty unless they are in a fence, and even in such case they may remain as personalty, if such be the agreement between the parties interested at the time the fence is built." *Harris v Scovel*, 85 Mich 32, 33 (Mich 1891). Here, fence materials are not at issue, but a fence already constructed and affixed to the realty. And the Bank surely did not agree at the time of construction that the fence might remain personalty.

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[5] Neither of these deponents were properly qualified as expert witnesses.

[6] We would add that it is unclear whether indeed the trees and fencing at issue were included in the appraisal that underlies the Bank's grant of a mortgage on the subject property. According to the deposition testimony of Christopher Christman, the contractor who moved the trees in question to Korn's property and planted them, roughly 120 of the approximately 200 trees were planted between September and November of 2003, and the remainder planted in April and May of 2004, with the installation of all of the trees completed by the end of May, 2004. (CC dep, p15) The equity line of credit and mortgage documents signed by the Bank and Korn were executed on May 28, 2004. Property appraiser Ron Prat testified in his deposition that he appraised Korn's property in March of 2004 at the request of Republic Bank, the senior lien holder, for purposes of re-financing; the completed appraisal was at Korn's direction turned over to Flagstar Bank rather than Republic. (RP dep, p18) If this appraisal was the one relied on by Standard Federal, then at a minimum most of the trees were in place and presumably factored into the property value.

[7] Incorrectly cited by defendant as *Groth v Stillson*, 20 MA 704.

Alternatively, we may apply basic fixture analysis. "An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty." *Fane v Detroit Library Comm*, 465 Mich 68, 78; 631 NW2d 678 (2001). This fence was annexed to the realty for the appropriate (and, based on the deposition testimony of Korn's neighbor Stuart Busse, apparently necessary) application of keeping Korn's dog enclosed. As to the issue of permanence, "[t]he surrounding circumstances determine the intent of the party making the annexation, not the annexor's secret subjective intent." *Wayne County v Britton Trust*, 454 Mich 608, 619; 563 NW2d 674 (1997). The deposition testimony of Korn's neighbors Camille and Stuart Busse establishes that Korn removed an existing fence and installed the fence at issue here in its place, then planted arborvitae bushes all along the new fence in an attempt to restore some semblance of the pastoral attractiveness of the former fence. These circumstances suggest intent to establish a permanent fence. The fixture criteria therefore being met, the fence stays with the realty.

V. Conclusion

We affirm the trial court's grant of plaintiff's motion for summary disposition as to the deficiency judgment and the summary dismissal, with prejudice, of defendant's counter-claim for declaratory relief.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski