STATE OF MICHIGAN

COURT OF APPEALS

HARRY G. CHANEY,

Plaintiff-Appellee,

v

LOIS J. MATTHEWS,

Defendant-Appellant.

UNPUBLISHED
December 14, 2006

No. 262162
Muskegon Circuit Court
LC No. 03-042558-CZ

Before: O'Connell, P.J., and White and Markey, JJ.

PER CURIAM.

Following a bench trial in this slander of title action, the trial court entered judgment in favor of plaintiff. Defendant appeals the judgment as of right. We affirm.

After more than 35 years of marriage, plaintiff and defendant divorced. The Kent Circuit Court set aside the initial property settlement stipulation, and the issue of dividing the couple's property went to trial. The Kent Circuit Court entered a final judgment on September 3, 2002, awarding plaintiff his Spring Lake residence in Fruitport free of any claim by defendant. In June 2003, plaintiff applied for a home equity line of credit on the Fruitport property. The mortgage company approved plaintiff's loan application, and a closing date was set for mid-July 2003. The loan never closed, however, because a title search revealed that defendant had levied a $300,000 mechanics lien against the property.

Defendant admitted that she filed the lien on November 14, 2002. According to defendant, plaintiff failed to comply with the judgment of divorce and owed her $300,000, so she filed the lien to protect herself and her assets. After learning of the lien, plaintiff asked that defendant remove the lien within the next seven days. Defendant failed to do so, and plaintiff ultimately filed this claim for slander of title against defendant. The trial court found in plaintiff's favor and awarded him costs and attorney fees.

Defendant first claims that the trial court erred in denying her motion to dismiss the claim so that it could be refiled in Kent Circuit Court and consolidated with the parties' divorce action. We disagree. Essentially, defendant argues a plea in abatement. See MCR 2.116(C)(6); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Unfortunately, defendant only cites to cases regarding a unique form of collateral estoppel, namely the prohibition against challenging a court's judgment by attacking its underling factual basis in a separate tort action for fraud. See *Triplett v St Amour*, 444 Mich 170; 507 NW2d 194 (1993), and *Nederlander v*

Nederlander, 205 Mich App 123; 517 NW2d 768 (1994). Collateral estoppel does not apply in this case because plaintiff filed his action to clear his title to the property eleven months after the Kent Circuit Court entered the divorce judgment. The suit did not collaterally challenge or re-litigate any fact or law related to the judgment, and if anything, only enforced the final judgment's determination that plaintiff should receive the property free of any claim by defendant. Nor did the suit challenge any of the collection proceedings later initiated in Kent County, but rather, it challenged an ex parte levy that had not been authorized by any court. Therefore, defendant's reliance on collateral estoppel is misplaced.

For similar reasons, abatement does not apply either. Abatement only applies to repetition of "the same claim" in a separate proceeding. MCR 2.116(C)(6). The only continuing action in Kent Circuit Court involved the collection proceedings that were correctly filed and executed by defendant's attorney, and those proceedings did not seek a lien against plaintiff's Fruitport property. The record clearly indicates that defendant's mechanics lien did not originate from the Kent Circuit Court or any other legally sophisticated source. Instead, it was levied in Muskegon County, ex parte, separately, illegally, and without resort to the judicial system, so the only relationship between defendant's improper mechanics lien and the Kent Circuit Court was the judgment that formed the basis of the alleged debt. Under the circumstances, clearing title on plaintiff's property was not "the same claim" as defendant's effective collection proceedings in Kent Circuit Court.

In real property cases, the plaintiff should ordinarily commence and try the action in the county where the property is located. MCL 600.1605. Because the Spring Lake property was located in Fruitport, Muskegon County was the proper venue for plaintiff's slander of title claim. Even if the Kent Circuit Court was a technically appropriate venue, we would not reverse the trial court's judgment on the basis of a venue dispute. MCL 600.1645; *Riverview v Sibley Limestone*, 270 Mich App 627, 638; 716 NW2d 615 (2006).

Defendant next claims that the trial court erred by finding that she maliciously filed the lien. We review a trial court's factual findings following a bench trial for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). To establish a claim for slander of title at common law or under MCL 565.108, "a plaintiff must show falsity, malice, and special damages . . . ." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Malice is the crucial element. *Gehrke v Janowitz*, 55 Mich App 643, 648; 223 NW2d 107 (1974). To prove malice, plaintiff "must show that defendant[] knowingly filed an invalid lien with the intent to cause plaintiff[] injury." *Sullivan v Thomas Org, PC*, 88 Mich App 77, 86; 276 NW2d 522 (1979).

Here, defendant filed the $300,000 lien on November 14, 2002, and she admitted that she did not know the law and that she had not sought the advice of her attorney before acting. Plaintiff resided at the property with the woman who was the principal point of contention in the divorce and property settlement action. At the time defendant filed the lien, plaintiff owed her an amount substantially less than the $300,000 professed in the mechanics lien, even assuming that all her allegations of debt were correct. The form of the lien itself suggests that defendant filed it

with absolute disregard for whether it related to any actual debt.[1] Rather, defendant admitted that she filed the lien to "get [defendant's] attention."

By the end of 2002, defendant's attorney had successfully attached plaintiff's personal property in Kent County to secure the judgment of divorce, and by June 2003, he had forced plaintiff to make spousal support payments, pay defendant $40,000 he owed her from the sale of the marital estate, and pay other installments under the judgment. Nevertheless, defendant refused to dissolve the lien throughout trial, even though plaintiff owed her only a fraction of the claimed debt when he filed suit, and only owed her $11,000 by the end of trial. The evidence suggested that defendant was still dissatisfied and angry with plaintiff. Specifically, she complained about him interfering with her attempts to sell "her" van. Defendant also claimed that plaintiff did not have life insurance as the judgment of divorce required, even though the testimony revealed that she was totally unaware of his actual insurance situation. Under these circumstances, the trial court did not clearly err by finding that defendant maliciously filed the lien. *Chapdelaine, supra*.

Defendant also claims that the trial court erred by awarding plaintiff attorney fees and costs. We review for abuse of discretion a trial court's decision to award attorney fees and costs, and apply the same standard to review the determination of the fees' reasonableness. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006). At the outset we note that defendant's misplaced argument regarding the lien's accuracy totally lacks factual or legal support. "An appellant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim." *Ambs v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Attorney fees and costs are recoverable in a slander of title action. MCL 565.108; *B & B Investment Group*, *supra* at 13-14.

Defendant argues that the trial court abused its discretion in awarding attorney fees and costs to plaintiff because plaintiff was not successful in obtaining actual or exemplary damages. Although a party's success is one of the factors in determining the reasonableness of attorney fees, *Windemere Commons I Ass'n*, *supra* at 683, whether the party is entitled to attorney fees and costs is a separate determination, *Wood v DAIIE*, 413 Mich 573, 587-588; 321 NW2d 653 (1982). Partial success does not preclude a trial court from exercising its discretion to award all the prevailing party's attorney fees and costs in appropriate cases. See *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Benevolent & Protective Order of Elks of USA*, 228 Mich App 20, 47; 577 NW2d 163 (1998). Because attorney fees and costs are recoverable in a slander of title claim, MCL 565.108, and defendant forced plaintiff into litigation to clear his slandered title, the trial court did not abuse its discretion by awarding attorney fees and costs to plaintiff.

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[1] Although the lien claimed the judgment of divorce as its basis, it also contained express language asserting that defendant had performed labor and materials to improve the property. This was a patently false statement of fact.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Jane E. Markey