

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT T. KATTULA and MARIA KATTULA,

Plaintiffs/Counter-Defendants-
Appellants,

v

REPUBLIC BANK,

Defendant/Counter-Plaintiff/Third-
Party Plaintiff-Appellee,

v

GENERAL ENVIRONMENTAL SERVICES,
LLC, and K&B CAPITAL, LLC,

Third-Party Defendants.

UNPUBLISHED

October 7, 2008

No. 279474

Oakland Circuit Court

LC No. 2006-072595-CZ

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's orders granting defendant's motion for summary disposition and request for attorneys' fees, and denying plaintiffs' motion for reconsideration. Because we conclude that there were no errors warranting relief, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs first argue that defendant's counterclaims involve an improperly endorsed check that became the property of General Environmental Services, LLC (GES) when it was deposited into GES' account at defendant bank. According to plaintiffs, because defendant's claims involve GES' property, a release contained in a bankruptcy order that permitted the debtors to sell GES' property free and clear of all claims properly applied to preclude defendants' counterclaims. For that reason, plaintiffs further contend, the trial court erred when it granted summary disposition in favor of defendants on defendants' counterclaims. We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Cowles v Bank West*, 476 Mich 1, 13; 719 NW2d 94 (2006). Likewise, whether the bankruptcy

order properly applied to preclude defendant's claims is a question of law, which this Court reviews de novo. *Id.*

Plaintiffs' reliance on the release and injunction language in the bankruptcy order is misplaced because the bankruptcy order did not apply to defendant's counterclaims. The bankruptcy order was issued under 11 USC § 363, which authorizes the sale of certain real property and related assets of the debtors free and clear of all liens, tax liens, claims, and encumbrances. The plain and unambiguous language of § 363(f) of the Bankruptcy Code allows the sale of estate property free and clear of "any interest in such property." Nevertheless, a § 363 sale of property does not release all claims generally. The language contained in § 363 refers only to the release of in rem claims; it does not mention in personam claims.

Section 363(f) does not authorize sales free and clear of *any interest*, but rather of *any interest in such property*. These three additional words define the real breadth of *any interests*. The sorts of interests impacted by a sale "free and clear" are *in rem* interests which have attached to the property. Section 363(f) is not intended to extinguish *in personam* liabilities. Were we to allow "any interests" to sweep up *in personam* claims as well, we would render the words "in such property" a nullity. No one can seriously argue that *in personam* claims have, of themselves, an *interest in such property*. [*Fairchild Aircraft, Inc v Cambell (In re Fairchild Aircraft Corp)*, 184 BR 910, 917-918 (Bankr WD Tex, 1995), vacated on other grounds by 220 BR 909 (Bankr WD Tex, 1998).]

See also *Yadkin Valley Bank & Trust Co v McGee (In re Hutchinson)*, 5 F3d 750, 756 n 4 (CA 4, 1993) (noting that "courts have recognized that general, unsecured claims do not constitute 'interests' within the meaning of § 363(f)").

In the present case, defendant alleged counterclaims against plaintiffs based on plaintiffs' own wrongdoing, including plaintiffs' liability for deliberately abusing the corporate form and unjust enrichment. Although defendant's counterclaims involved the actions that led to the deposit of the check, defendant did not directly assert a claim against GES property. Further, the injunction provision of the bankruptcy order clearly protects only the purchaser of property based on pre-existing claims or liens. Indeed, the order repeatedly refers to claims against purchasers of property "on account of such Liens and Claims." But defendant's claims against plaintiffs do not arise out of plaintiffs' purchase of GES property. Therefore, the release language in the bankruptcy order did not affect defendant's counterclaims against plaintiffs. Because plaintiffs failed to establish any facts showing a genuine issue of material fact, the trial court properly granted summary disposition in favor of defendant under MCR 2.116(C)(10). See *Cowles, supra* at 32. Likewise, because the release did not apply to defendant's counterclaims, the trial court properly denied plaintiff's motion for reconsideration based on the same argument. See *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Plaintiffs next argue that the trial court erred in awarding attorneys' fees to defendant because defendant never raised a separate legal theory or breach of contract claim in its request for attorneys fees and defendant argued that its counterclaims did not relate to the GES account.

Paragraph 4 of the deposit account agreement provided: "You agree to be liable to us for any loss, cost, or expense that we incur as the result of any dispute . . . involving your account,

including reasonable attorneys fees to the extent permitted by law. . . .” Plaintiffs’ signatures on the new account information form for GES acknowledged receipt of the deposit account agreement and indicated an agreement to be bound by it. Therefore, defendant was entitled to recover attorneys’ fees as a result of the dispute relating to the GES account as provided for in the deposit account agreement. Defendant did not have to plead a separate breach of contract claim for attorney fees. Finally, defendant’s argument that it did not assert counterclaims against GES property and, as a result, that the release did not bar their claims was not inconsistent with its claim that plaintiff’s wrongdoing involved their use of the GES deposit account, which was governed by the deposit agreement.

The trial court did not err when it found that the dispute involved the account and awarded attorneys fees to defendant.

Affirmed.

/s/ Peter D. O’Connell

/s/ Michael R. Smolenski

/s/ Elizabeth L. Gleicher