STATE OF MICHIGAN

COURT OF APPEALS

KATHY ANDERSON STARK, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED November 17, 2016
v	Nos. 329434; 329882 Kent Circuit Court
JAMES L. KLUNGLE, Defendant/Counter-Plaintiff-Appellant.	LC No. 12-005591-CH

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

In docket number 329434, defendant appeals from the trial court's grant of summary disposition in favor of plaintiff on defendant's counterclaim for slander of title. In docket number 329882, defendant appeals from the trial court's denial of fees and costs. We affirm.

This dispute has a long and tortured history. It has its origins in plaintiff's divorce from Mark Klungle, defendant's brother. The trial court summarized the history of the dispute in its ruling on the summary disposition motion as follows:

> This case has been litigated for years in one form or another and involves the issue of the plaintiff's encumbrance or lack thereof on a house which belongs to the defendant, James Klungle.
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> Plaintiff divorced defendant's brother, Mark Klungle, in 2002, and at that time Mark had put down $60,000 toward the purchase of the subject property.
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> * * *
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> It was understood to be Mark and defendant's intention that Mark would at some point purchase the property from the defendant in return, and as a final property settlement in the divorce, plaintiff was to execute a quitclaim deed transferring her interest in said property to defendant husband, reserving a lien to her in the amount of $168,827. However, Mark Klungle never took title to the property from defendant, and it has become impossible for plaintiff, therefore, to secure the lien that was awarded in the divorce case.

Cases have been filed in this court and in the family court arguing over the status and import of the lien awarded by the divorce court in 2003, 2005, 2012, 2013, in addition to the 1999 divorce case and a 2005 bankruptcy case initiated by Mark Klungle.

In the May 2003 case, defendant filed a quiet title and slander of title action against plaintiff . . ., seeking a ruling as to plaintiff's alleged lien on the property. The 2003 case was dismissed, the slander of title claim was dismissed with prejudice, and the quiet title claim without.

Accordingly, defendant attempted to intervene in the divorce case in 2004, but was denied. Instead, defendant brought suit in this court for a quiet title against Mark in 2005 . . . . Mark Klungle defaulted, and judgment was entered in defendant's favor. In her 2014 order, Judge Feeney of the family division of this court referred to this 2005 action as, quote, "a charade of collusive quiet title action," unquote. Plaintiff was allegedly unaware that this matter took place until much later, though she should have been added, as she claims, as an interested party.

The specific matter was filed before this Court in 2012 as plaintiff's latest attempt to establish an interest in the property. Defendant filed a countercomplaint claiming slander of title due to a notice of lis pendens that plaintiff placed on the property on December 22nd, 2011.

At around the same time plaintiff filed an action in front of Judge Feeney . . . . The Circuit Court case was held in abeyance awaiting a decision from family court.

On May 19th, 2014, Judge Feeney held in favor of the defendant, and so it has finally been decided that plaintiff does not have an interest in the subject real estate. Therefore, plaintiff's complaint in this matter has been dismissed, and all that remains are defendant's counterclaims.

* * *

The family court, on May 13th of 1999, allowed Mark Klungle to take $60,000 from a marital account to purchase a home. Mark Klungle apparently loaned his brother, the defendant herein, the $60,000 in exchange for a promissory note. In the event, as we've heard again today, Mark Klungle was unable to secure financing directly, so this arrangement was an attempt for the defendant to purchase a home that would eventually be transferred to Mark Klungle. Defendant closed on the property October 12th of 1999 and took title in fee simple.

The matter is further complicated by the fact that Mark Klungle apparently lived at the property for around 15 years, paying a rent, which turned out to be the exact amount of the mortgage.

Turning first to docket number 329434, the only issue remaining before the trial court, and the only issue before us on appeal, is whether defendant has a viable slander of title claim. The trial court concluded that he does not and granted summary disposition to plaintiff. The trial court granted summary disposition based upon two statutory provisions, MCL 565.25(2)(d) and MCL 565.108. We review a grant of summary disposition de novo. *Citizens Ins Co of America v Buck*, 216 Mich App 217, 221; 548 NW2d 680 (1995).

MCL 565.25 provides in pertinent part as follows:

> (1) Except as otherwise provided in subsection (2), the recording of a levy, attachment, lien, lis pendens, sheriff's certificate, marshal's certificate, or other instrument of encumbrance does not perfect the instrument of encumbrance unless both of the following are found by a court of competent jurisdiction to have accompanied the instrument when it was delivered to the register under section 24(1) of this chapter:
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> * * *
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> (2) Subsection (1) does not apply to any of the following:
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> * * *
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> (d) The filing of an encumbrance authorized in a final order by a court of competent jurisdiction.

The trial court summarized the parties' position on this issue, and stated its conclusion, as follows:

> It has been asserted here by the plaintiff that MCL 565.25(2)(d) authorizes the filing of this lis pendens because it was authorized in a final order by a court of competent jurisdiction; that is to say, that Judge Feeney's order in the divorce case authorized the lien and ordered the lien and therefore would authorize an encumbrance.
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> The defense here is saying, well, the divorce court was not a court of competent jurisdiction because in the event Mark Klungle never did acquire title to the subject property, it has remained in the person of his brother, James Klungle.
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> I don't think that fact makes the divorce court not a court of competent jurisdiction. The divorce court had jurisdiction over Ms. Stark and Mark Klungle, and Mark Klungle seems to have had an interest, perhaps contingent interest, in the real estate in question. It appears that he had paid some money towards it. It appears he lived in the residence for a number of years and paid in effect the mortgage on it. And there is every reason to believe that he was or could have been in a position to acquire some legal interest in the real estate. If he had done so, the lien would have been valid, and Ms. Stark would have been able to have

her remedies accordingly. So it seems to me that the filing was authorized in a final order by a court of competent jurisdiction.

As for MCL 565, 108, that statute provides as follows:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

The trial court, after quoting MCL 565.108, concluded that this statute precluded defendant's claim for slander of title for the following reasons:

> The point being that while undoubtedly the lis pendens has created some significant problems for Defendant James Klungle, there is no indication that the lis pendens was filed for the purpose of slandering title to land and for that reason only. It seems that up until Judge Feeney's order in 2014, there was a viable or at least an arguable claim for Ms. Stark to pursue on her lien. And it seems to me that that [sic], for the purpose of vindicating or seeking to vindicate that claim, the lis pendens was not an inappropriate filing or a malicious one or filed only for the purpose of slandering title to land.
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> * * *
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> Now, as I've indicated, ultimately I believe the family court correctly concluded that Ms. Stark's lien was invalid because James Klungle has remained the title holder, and although Mark Klungle may have had a contingency interest in the land, it was never vindicated, never validated, and Mark Klungle therefore never came into any legal recognized title to the subject property.
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> But the lis pendens, it seems to me, could be validly pressed up until the time of Judge Feeney's order, and of course after Judge Feeney's order the lis pendens had been removed.

In arguing that the trial court erred in granting summary disposition on this ground, defendant first argues that plaintiff waived this argument by not pleading the statute as an affirmative defense. We disagree. The statute does not create an affirmative defense that must be pled, but, rather, it establishes what must be proven in order to prevail on claim of slander of title. That is, the absence of malice is not something which must be pled and proven as an affirmative defense; rather, the presence of malice is something which must be proven in order to establish slander of title.

Next, defendant argues that the "facts clearly demonstrate that Plaintiff's sole motive in recording the Notice of Lis Pendens was to harm Defendant." Like the trial court, we disagree.

Defendant cites this Court's opinion in *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990), for the proposition that, in order to prevail, he need only prove "falsity of statement and malice." Defendant, however, carefully leaves out the Court's full discussion of the issue:

> The elements of slander of title are falsity of statement and malice. *Michigan Nat'l Bank-Oakland v Wheeling*, 165 Mich App 738, 744; 419 NW2d 746 (1988). Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. *Sullivan v Thomas Organization, PC*, 88 Mich App 77, 86; 276 NW2d 522 (1979).
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> Defendants alleged malice and an intent to injure defendants. The order granting plaintiffs' cross-motion does not contain specific findings, but dismisses the claim pursuant to plaintiffs' motion, which, with respect to this claim, was based on MCR 2.116(C)(10) and MCR 2.116(I)(2).
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> Defendants had the burden of showing that an issue of material fact existed with respect to their slander of title claim. See *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 118; 421 NW2d 592 (1988). Where the opposing party fails to produce affidavits or evidence establishing a material issue of fact, summary disposition is properly granted. *Young v Oakland General Hosp*, 175 Mich App 132, 138; 437 NW2d 321 (1989), lv den 434 Mich 893 (1990).

The only evidence offered by defendant to establish plaintiff's malice are various statements she made in her deposition which could arguably support the conclusion that she harbors a great deal of animosity towards her ex-husband. Defendant then reaches the conclusion that this "deep malice" towards her husband led plaintiff "to use her invalid lien interest to punish Mark Klungle and his family." Defendant then lays out the history of this dispute to establish that plaintiff should have known that her claim of a lien against the property was invalid.

But, even accepting the conclusions that (1) plaintiff harbors acrimony, or even malice, towards her ex-husband and (2) objectively, she should have realized that there was no valid lien on the property because her ex-husband never acquired actual title, that is insufficient to establish that she "knowingly filed an invalid lien with the intent to cause the plaintiff injury." As the trial court's review of the history of this dispute shows, the issues surrounding this case and any lien interest by plaintiff are rather muddled. Ultimately, we cannot disagree with the trial court's observation that

> up until Judge Feeney's order in 2014, there was a viable or at least an arguable claim for Ms. Stark to pursue on her lien. And it seems to me that that [sic], for the purpose of vindicating or seeking to vindicate that claim, the lis pendens was not an inappropriate filing or a malicious one or filed only for the purpose of slandering title to land.

The trial court reinforced its view when it denied defendant's motion for sanctions on plaintiff's complaint:

> Given the circumstances of the murky status of title in this case, I have a hard time concluding that the plaintiff's action was frivolous. It may have been unsuccessful, and at some point maybe she should have given up the ghost, but it's hard to conclude that the action was frivolous.

The trial court's conclusion is consistent with the statement in *Stanton* that the mere fact that the lien is invalid does not compel the conclusion that there was malice. As the trial court observed, following Judge Feeney's order, the lis pendens was removed. Once it was finally and definitively established that the lien authorized in the divorce judgment could not attach to the property, plaintiff gave up. Were she to continue to press the issue, that might well fall within *Stanton*'s example of malice being established by a party "knowingly [filing] an invalid lien with the intent to cause the plaintiff injury." But defendant simply has not created an issue of fact here to establish that. Accordingly, the trial court correctly granted summary disposition on this basis.

In light of our conclusion on this issue, we need not address defendant's remaining arguments on his slander of title claim. Next, we turn to defendant's arguments regarding the trial court's denial of fees and costs. First, defendant argues that the trial court erred in denying sanctions under the offer of judgment rule, MCR 2.405. We disagree.

Initially, the trial court denied sanctions on the basis that the request was untimely. MCR 2.405(D) requires that a request for sanctions be filed within 28 days of the entry of judgment. The trial court measured the 28 days from the dismissal of plaintiff's claim, although defendants counterclaim for slander of title was still pending. The request for sanctions was filed within 28 days of the dismissal of the slander of title claim, which disposed of all of the remaining claims in this case. The trial court denied reconsideration, stating that "even if Defendant's argument regarding his timeliness was true," the trial court was also denying sanctions under MCR 2.405(D)(3) which directs that the "court may, in the interest of justice, refuse to award an attorney fee under this rule." The court opined that "[g]iven the history of the case and the past actions of Defendant, the Court finds that in the interest of justice, attorney fees are inappropriate here." We agree with the trial court and do not find that it abused its discretion in determining that an award of sanctions under the offer of judgment rule was not in the interests of justice. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 516; 844 NW2d 470 (2014).

The trial court also dealt with defendant's request for fees and costs under MCR 2.313. The trial court relied on the provisions of MCR 2.313(C)(2) and (4) which denies the awarding of costs and fees if "the admission sought was of no substantial importance" or if "there was other good reason for the failure to admit." We review the trial court's denial of sanctions for an abuse of discretion. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 349-350; 793 NW2d 246 (2010). The specific requests to admit were (1) that no document conveying the property to defendant's brother had been recorded, (2) that defendant's brother never had a legal interest in the property, and (3) that defendant is the legal owner of the property. The trial court presided over this litigation and if it determined that the requested information was not of substantial importance to the trial court's resolution of the matter, we are not inclined to disagree with the trial court.

Finally, defendant argues that the trial court erred in denying sanctions under MCR 2.114 for filing a frivolous action. We previously quoted from the trial court's opinion denying these sanctions, with the trial court concluding that, although plaintiff was ultimately unsuccessful "and at some point maybe she should have given up the ghost," the trial court was not convinced that plaintiff's action was frivolous. We review the trial court's determination for clear error. *Guerrero v Smith*, 280 Mich App 647, 677; 761 NW2d 723 (2008). A decision is clearly erroneous if "we are left with a definite and firm conviction that a mistake has been made." *Id*. Given the long history of events in this dispute and what the trial court described as the "murky status of title," we are not left with a definite and firm conviction that the trial court made a mistake in denying sanctions under MCR 2.114.

Affirmed. Plaintiff may tax costs.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien