STATE OF MICHIGAN

COURT OF APPEALS

MACKINAC ISLAND FERRY CAPITAL, LLC,

Plaintiff/Counterdefendant-Appellee,

v

DONALD R. SCHAPPACHER,

Defendant/Counterplaintiff-Appellant,

and

HALDIMAND BAY COMPANY, LLC, and UNION TERMINAL PIERS, INC.,

Defendants.

UNPUBLISHED
December 20, 2016

No. 333576
Mackinac Circuit Court
LC No. 16-007878-CH

Before: BORRELLO, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Appellant appeals by leave granted from the trial court's orders quieting title to real property in favor of appellee, denying appellant's motions for equitable relief, and certifying the order effectuating those decisions as a final one. We affirm.

I. FACTS

This case involves interests in more than forty parcels of real property in Mackinac County. In 2013, appellant entered into a loan agreement with four corporate entities, including defendants Union Terminal Piers, Inc. (UTP), and Haldimand Bay Company (HBC), for a $1,250,000 line of credit. At that time, appellant's attorney was an officer for each of the corporate borrowers, and he separately signed the credit agreement on behalf of each. On the same day, HBC executed a mortgage on forty-two parcels of real property to appellant as security for the loan. Although HBC was the only mortgagor identified, and appellant's attorney signed the agreement on behalf of HBC, the latter did not in fact own any of the parcels. They were instead owned by UTP, HBC's subsidiary.

Appellee acquired the parcels in 2014 when UTP surrendered the attendant deeds to it in lieu of foreclosure during proceedings in federal court.

At about the same time, appellee was involved in an unrelated lawsuit with Main Dock 7271, LLC, with whom appellee had entered into a settlement agreement in September 2015, according to which appellee agreed to transfer two of its parcels to Main Dock. Appellee was in the process of completing the transfer of the two parcels to Main Dock when it discovered that appellant had filed a lis pendens and an "Affidavit of Real Property" on all the parcels on February 16, 2016. Appellant claimed a secured interest in the properties on the basis of the 2013 mortgage agreement between himself and HBC, or alternatively on a theory of equitable mortgage. Because of the lien, appellee was unable to complete the transfer of the property to Main Dock in satisfaction of their settlement agreement.

Appellee brought this action seeking declaratory relief, to quiet title, and removal of the lien. Appellee also alleged slander of title and tortious interference with contract or business relationship. Appellant filed a countercomplaint, alleging breach of contract and tortious interference with contract. He sought reformation of the mortgage agreement that purported to give him an interest in the parcels as security for the loan, or, alternatively, the imposition of an equitable mortgage.

The trial court granted partial summary disposition in favor of appellee. Because there was no dispute that UTP owned the parcels, the court concluded that the mortgage that HBC granted appellant did not convey any legal interest in them, and that appellant was not entitled to equitable relief. The court further noted that, in the event that the loan was not repaid appellant's remedies included "breach of contract or tort claims against [the drafting attorney], HBC, and/or UTP, as well as the other causes of action listed in his counter-complaint." See *In re Moukalled Estate*, 269 Mich App 708, 719; 714 NW2d 400 (2006) ("An equitable lien cannot be imposed . . . if the proponent has an adequate remedy at law."). The court additionally elicited from appellant's attorney that appellant was aware that UTP surrendered the deeds to the subject parcels to appellee in lieu of foreclosure in May 2015 but took no action to assert his claim of a security interest in them until he filed his affidavit regarding real property in February 2016. See *Falk v State Bar*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (observing "equity aids the vigilant, not those who sleep on their rights" (internal quotation marks and citations omitted)); *Townsend v Chase Manhattan Mgt Corp*, 254 Mich App 133, 140; 657 NW2d 741 (2002) ("We think it insufficient to invoke equity to save the mortgagee from its own mistake, particularly where the mortgagee is a sophisticated commercial lender.").

The court held that issues of fact remained regarding the breach of contract and tortious interference claims. Although the order reflecting those determinations thus adjudicated fewer than all of the claims, the court, at appellee's request, designated it as a final order under MCR 2.604(B) and MCR 2.605(E), and ordered the discharge or cancellation of the lis pendens and affidavit regarding real property.

Asserting that the trial court erred in designating its order granting partial summary disposition as a final order, appellant filed an application for leave to appeal in this Court, while alternatively asking the Court to treat the application as a claim of appeal. The Court granted immediate consideration, granted the application for leave, and ordered the appeal expedited.[1]

II. EQUITABLE RELIEF

Appellant argues that the trial court erred in denying his alternative requests for reformation of the mortgage agreement or an equitable mortgage, or at least in failing to recognize material questions of fact relating to those issues. We disagree.

"[T]his Court reviews equitable actions de novo, including actions to quiet title." *Burkhardt v Bailey*, 260 Mich App 636, 646; 680 NW2d 453 (2004). Likewise a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Whether equitable relief is proper under a given set of facts is a question of law that this Court reviews de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008).

That UTP was the owner of the subject parcels and thus the party in a position to mortgage them, and that HBC in fact owned UTP and was the entity purportedly conveying the mortgage interest, suggest that HBC might be considered to have stepped into its subsidiary's shoes in the matter, or at least to have presented itself as UTP's agent for purposes of invoking the doctrine of apparent authority. The trial court indicated that appellant in fact presented such arguments below, but the court deemed them abandoned because of inadequate advocacy. Appellant does not revisit these arguments on appeal, thus leaving unchallenged the trial court's assertion that there was no factual dispute that HBC neither held title to the property nor otherwise had the authority to encumber it at the time the mortgage was executed. Much in force in this case is the "general principle that in Michigan separate entities will be respected," including the separate legal identities of a corporation and its corporate parent. *Helzer v F Joseph Lamb Co*, 171 Mich App 6, 9; 429 NW2d 835 (1988)(citation omitted).

A court of equity has the power to reform a contract that does not express the true intent of the parties because of fraud, mistake, accident or surprise. *Johnson Family*, 281 Mich App at 371-372. A mutual mistake of fact is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006).

Likewise, "a court of equity can declare a deed absolute on its face to be a mortgage." *Grant v Van Reken*, 71 Mich App 121, 125; 246 NW2d 348 (1976). "Although no set criterion has been established, the controlling factor in determining whether a deed absolute on its face should be deemed a mortgage is the intention of the parties." *Koenig v Van Reken*, 89 Mich App

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[1] *Mackinac Island Ferry Capital, LLC v Schappacher*, unpublished order of the Court of Appeals, entered July 22, 2016 (Docket No. 333576).

102, 106; 279 NW2d 590 (1979). Generally, an equitable mortgage will be imposed if it is shown that there was an intention to place a lien on the real estate or a promise that the real estate would be used as security, but for some reason the intended purpose was not accomplished. *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 352; 820 NW2d 242 (2012). Courts must consider all of the facts and circumstances to determine whether there was an agreement between the parties that identified a parcel of property intended to act as security for a debt. *Moukalled Estate*, 269 Mich App at 719.

In connection with both equitable theories,[2] appellant emphasizes that the two participants in the mortgage transaction—himself and his attorney who was also acting as an officer of HBC—averred that they had intended to create a security interest for appellant's loan to the four corporate entities. The attorney/officer, however, did not sign the mortgage in his individual capacity, but rather as the agent of HBC, the only mortgagor specified in the agreement. Further, the trial court correctly noted that there was no evidence to suggest that UTP participated in the negotiation of the terms of the mortgage.

"If the asserted mutual mistake is with respect to an extrinsic fact, reformation is not allowed, even though the fact is one which would have caused the parties to make a different contract, because courts cannot make a new contract for the parties." *Dingeman v Reffitt*, 152 Mich App 350, 358; 393 NW2d 632 (1986). Appellant cites no authority that stands for the proposition that a court may reform a contract to conform to its signers' intentions to transact a mortgage on property whose owner was never party to the agreement. The equitable relief that appellant seeks is not the reformation of a contract between its contracting parties, but the creation of a new contract between himself and a different party. The trial court correctly recognized the impropriety of bringing about that result, by way of either reformation or imposing a constructive mortgage.

III. DISCOVERY

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[2] Appellant also characterizes the mistake in identifying the party with the ownership interest in the subject property giving rise to the right to offer it as collateral for a loan as a scrivener's error, but we think that characterization inapt. A scrivener's error, or "clerical error," is a "minor mistake or inadvertence," "a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading," for example "omitting an appendix from a document; typing an incorrect number; mistranscribing or omitting an obviously needed word . . . ." *Black's Law Dictionary* (10th ed). We find instructive the Sixth Circuit's statement that "a clerical error must not be one of judgment or even of *misidentification*, but merely of recitation, of the sort that a clerk or amanuensis might commit, mechanical in nature." *United States v Robinson*, 368 F3d 653, 656 (CA 6, 2004) (emphasis added, internal quotation marks and citation omitted). The mistake at issue here is the misidentification of the one of the four borrowing corporations as the one owning real estate with the ability to grant a mortgage as collateral and not the accidental writing of "Haldimand Bay Company" while intending to specify "Union Terminal Piers."

Appellant argues that summary disposition on appellee's claim for declaratory relief and quiet title and on appellant's request for equitable relief was premature because no discovery had taken place. We disagree. This Court reviews a lower court's decisions concerning discovery for an abuse of discretion. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

"Generally, a motion for summary disposition is premature if granted before discovery on a disputed issue is complete." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 24-25; 672 NW2d 351 (2003). However, summary disposition may be appropriate where further discovery offers no reasonable opportunity to uncover factual support for the opposing party's position. *Id.* at 25. The party arguing that summary disposition is premature for want of further discovery must offer some independent evidence that a factual dispute exists. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009).

In this case, appellant argues that discovery is required to address questions of fact regarding the parties' intent, the nature of the mistake in drafting the mortgage or in knowing which entity owned the parcels at issue, whether the officer who signed the mortgage agreement on behalf of HBC was also acting as appellant's attorney, and whether appellee knew about appellant's security interest in the properties at the time of the foreclosure.

Still, there is no dispute that the parties to the mortgage agreement were appellant and HBC, the latter being the only mortgagor named. Because the owner of the property to be encumbered was not party to agreement, no mortgage was created. Further, the uncontested admissions of both individuals participating in the mortgage transaction that the signer for HBC drafted the mortgage in his capacity as appellant's attorney are properly held against them both for purposes of establishing that any errors in the drafting or execution attributable to the drafting attorney are attributable also to his client, and thus appellant is not entitled to equitable relief in the matter. See *Everett v Everett*, 319 Mich 475, 482; 29 NW2d 19 (1947) ("[T]he law regards the neglect of an attorney as the client's own neglect and will give no relief from the consequences thereof." (Citations and internal quotation marks omitted)). Moreover, appellant admitted, through counsel, that he knew about the conveyance of deeds for the subject parcels in May 2015, and the record shows that he did not take action to protect any ostensible security interest until he filed his affidavit regarding real property in February 2016.

For these reasons, we conclude there was no genuine question of material fact regarding the mortgage, and that further discovery could not alter the legal conclusion that it was invalid.

IV. FINAL ORDER

Appellant argues that the trial court erred in designating its April 29, 2016 order a final one under MCR 2.605(E) and MCR 2.604(B). Because we accepted this appeal on an application for leave to appeal an interlocutory order, see MCR 7.203(B)(1), the propriety of this Court's exercising jurisdiction in this instance does not depend on there being a final order below. This procedural posture effectively renders this issue moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief."). We will address it nonetheless in case it should arise again on remand. See *Contesti v Attorney General*, 164 Mich

App 271, 278; 416 NW2d 410 (1987) ("[T]his Court will entertain cases that are technically moot if the issues involved are of public significance and are likely to recur in the future and yet evade judicial review"). "The interpretation and application of court rules . . . presents a question of law that is reviewed de novo." *Staff v Johnson*, 242 Mich App 521, 527; 619 NW2d 57 (2000).

Appellee explains that it moved the trial court to designate its April 29, 2016 order a final one "to obtain finality with respect to any potential claims regarding fee ownership of the Real Property involved in this action," and that the trial court's cooperation in that regard "moved [appellee] one step closer towards obtaining 'clear title' . . . ." Appellant argues that once the trial court designated the April 2016 order as final, it discharged the lis pendens and affidavit of real property that he had filed, after which appellee transferred some of the subject parcels. Appellant asserts that UTP "likely would not have transferred these parcels if the April 2016 Order was correctly designated a non-final order, which would have prevented discharge of the affidavit or *lis pendens*." Appellee wants that designation reversed, and his affidavit regarding real property and lis pendens reinstated, "[t]o prevent further conveyances by [appellee], which irreparably harm [appellant's] ability to foreclose on the Mortgage."

Generally, in civil cases in the circuit court, a "final order" is "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). Not in dispute in this case is that the April 29, 2016 order granting appellee partial summary disposition left some claims pending and some of the rights or liabilities of the parties yet to be decided. However, MCR 7.202(6)(a)(ii)-(v) defines certain kinds of orders as final that do not satisfy the criteria of MCR 7.202(6)(a)(i).

Again, the trial court cited MCR 2.605(E) and MCR 2.604(B). The latter states that "[i]n receivership and similar actions, the court may direct that an order entered before adjudication of all the claims and rights and liabilities of all the parties constitutes a final order on an express determination that there is no just reason for delay." A "receivership" is a "proceeding in which a receiver is appointed for an insolvent corporation, partnership or individual to preserve its assets for benefit of affected parties," or the "state or condition" of such an insolvent entity. *Black's Law Dictionary* (6th ed). Because a quiet-title action is not one involving fiduciaries' controlling or managing the property of others, we think the instant case too far removed from receivership to come under MCR 2.604(B).

MCR 2.605(E) in turn states that "[d]eclaratory judgments have the force and effect of, and are reviewable as, final judgments." Appellant suggests that this rule only clarifies that declaratory judgments are included among the judgments or orders recognized as final under MCR 7.202(6)(a), opining that the rule does not transform an otherwise interlocutory order into a final order merely because it takes the form of a declaratory ruling. We agree. MCR 7.202(6)(a)(ii) offers support for appellant's position in specifying "an order designated as final under MCR 2.604(B)," while no part of MCR 7.202(6)(a) refers to MCR 2.605(E). In endeavoring to be comprehensive in setting forth the kinds of civil judgments or orders that are appealable by right as final judgments or orders, MCR 7.202(6)(a) expressly acknowledges that an order that leaves some claims pending or some rights or liabilities of the parties yet to be decided may nonetheless be a final one under MCR 2.604(B), but it does not refer to MCR 2.605(E) as similarly setting forth particular criteria for establishing a final order. For these

reasons, we conclude that the trial court erred in citing MCR 2.605(E) as a basis for deeming its April 29, 2016 order a final one when it does not satisfy any of the criteria of MCR 7.202(6)(a).

V. REINSTATING AFFIDAVIT

Concerning appellant's request for reinstatement of his affidavit regarding real property and lis pendens, because we have concluded that the trial court properly determined that no mortgage existed and properly declined exercise its equitable powers to place a real or constructive one, we must also conclude there is no basis for reinstating the affidavit regarding real property or lis pendens.

We affirm and remand, except as noted. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Jane E. Markey