

STATE OF MICHIGAN
COURT OF APPEALS

RALPH ROBERTS REALTY, LLC,

Plaintiff/Counterdefendant-
Appellant,

v

DENNIS HADEL, DJH INVESTMENT
HOLDINGS, LLC, 251644 ROSEBUSCH
GROUP, LLC, BLACKETT GROUP, LLC, and
35590 CAPRI GROUP, LLC,

Defendants/Counterplaintiffs-
Appellees.

UNPUBLISHED
November 21, 2019

No. 347174
Macomb Circuit Court
LC No. 2017-003267-CB

Before: JANSEN, P.J., and BOONSTRA and LETICA, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendants. We affirm.

I. RELEVANT FACTUAL BACKGROUND

In the summer of 2010, plaintiff and Hadel entered into discussions for Hadel to participate in a real estate investment program run by plaintiff. The terms of the investment program were outlined in a written acquisition agreement. Under the terms of the agreement, plaintiff would identify potential investment properties for purchase and would purchase them on Hadel's behalf at a sheriff's sale. Plaintiff would then title the properties in the name of Hadel or Hadel's designated entity. Plaintiff would receive \$5,000, per property, for this service. In addition, plaintiff was entitled to 50% of the gross sales price of each property if it was sold within five years of the agreement, and plaintiff could file claims of interest in the properties. If

the properties were not sold within five years of the agreement, then plaintiff was entitled to 50% of the properties' gross projected sale prices premised on valuations of the properties.

Between April 13, 2010 and July 27, 2012, plaintiff purchased eight properties on Hadel's behalf.¹ Plaintiff alleged that Hadel signed written contracts for the purchase of the signed properties between September 4, 2012 and October 8, 2012 based on the terms of the real estate investment program agreement. However, Hadel denied entering into any written contracts with plaintiff, and argued that he only agreed to pay plaintiff \$5,000 to acquire and title each property.

Plaintiff filed for bankruptcy in 2012, and filed a disclosure statement as part of its bankruptcy proceedings on December 12, 2012. In his disclosure statement, plaintiff failed to state that it had any potential claims against defendants when it disclosed its reserved causes of action. Additionally, plaintiff stated in its disclosure statement that the written and oral contracts it had with various clients to split profits "generated as a result of investors' sales of real estate" had a "net present value" of zero dollars. Plaintiff did disclose that Hadel was an investor who had contracts with plaintiff for the Blackett property, the Lexington property, the Rosenbusch property, the Couzens property, the property located at 26501 Grandmont, the Capri property, and the Chart property. United States Bankruptcy Judge Thomas J. Tucker confirmed plaintiff's disclosure statement and reserved causes of action on February 13, 2013.

Between April 12, 2013 and October 14, 2015, plaintiff purchased an additional five properties on Hadel's behalf.² Plaintiff and Hadel agree that no contract was ever signed for the

¹ Specifically, plaintiff made the following eight purchases on Hadel's behalf: (1) 26501 Grandmont, Roseville, Michigan (the 26501 Grandmont property), purchased for \$10,644 and titled in the name of Hadel, (2) 29764 Chart Street, Harrison Township, Michigan (the Chart property), purchased for \$56,793 and titled in the name of Hadel, (3) 26377 Couzens Avenue, Madison Heights, Michigan (the Couzens property), purchased for \$25,043 and titled in the name of Hadel, (4) 23791 Lexington Avenue, Eastpointe, Michigan (the Lexington property), purchased for \$12,342.46 and titled in the name of Hadel, (5) 23676 Blackett Avenue, Warren, Michigan (the Blackett property), purchased for \$12,801 and titled in the name of 23676 Blackett Group, LLC, a limited liability company owned by Hadel, (6) 35590 Capri, Clinton Township, Michigan (the Capri property), purchased for \$12,326.29 and titled in the name of 35590 Capri Group, LLC, a limited liability company owned by Hadel, (7) 25164 Rosenbusch Boulevard, Warren, Michigan (the Rosenbusch property), purchased for \$15,600 and titled in the name of 25164 Rosenbusch Group, LLC, a limited liability company owned by Hadel, and (8) 32750 North River Road, Harrison Township, Michigan (the North River property, together "the signed properties"), purchased for \$184,304.89 and titled in the name of 32750 North River Group, LLC, a limited liability company owned by Hadel.

² Specifically, plaintiff made the following five purchases on Hadel's behalf: (1) 25564 Wagner Avenue, Warren, Michigan (the Wagner property), purchased for \$32,250 and titled in the name of Hadel, (2) 26632 Groveland Street, Roseville, Michigan (the Groveland property), purchased for \$23,251 and titled in the name of DJH Investment Holdings, LLC, a limited liability

purchase of these properties. Plaintiff alleged that the unsigned properties were purchased under the terms of the real estate investment program agreement, but Hadel maintained that the only contract for the purchase of the unsigned properties was for Hadel to pay plaintiff \$5,000 to purchase and title each of these properties.

Between January 31, 2013 and March 3, 2015, plaintiff filed claims of interest for all of the properties. Plaintiff alleged that Hadel failed to make any payments under the written and oral contracts, other than the initial \$5,000 payments to plaintiff for the purchase and titling of each of the properties. Accordingly, plaintiff filed a complaint in August 2017, and alleged that it was entitled to 50% of the properties' equity values under the terms of the contracts.

Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10), and argued that the oral contracts were unenforceable under the statute of frauds because they granted a conveyance of land to plaintiff, and that plaintiff sought commissions for the sales of real estate. Defendants amended their motion for summary disposition and additionally argued that plaintiff's claims regarding the Blackett property, the Lexington property, the Rosenbusch property, the Couzens property, the property located at 26501 Grandmont, the Capri property, the Chart property, and the North River property were barred by judicial estoppel because of the positions plaintiff took in its bankruptcy proceedings. The trial court agreed, and granted summary disposition to defendants, finding plaintiff's claims were barred by judicial estoppel and that the oral contracts were unenforceable under the statute of frauds because plaintiff sought payments of commissions for the sale of real estate. This appeal followed.

II. STANDARD OF REVIEW

A trial court's summary disposition ruling is reviewed de novo. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). Defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10).

With respect to a summary disposition motion brought under MCR 2.116(C)(7):

A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not

company owned by Hadel, (3) 26307 Grandmont Street, Roseville, Michigan (the 26307 Grandmont property), purchased for \$19,500 and titled in the name of DJH Investment Holdings, LLC, a limited liability company owned by Hadel, (4) 24339 Laetham Avenue, Eastpointe, Michigan (the Laetham property), purchased for \$14,061.23 and titled in the name of DJH Investment Holdings, LLC, a limited liability company owned by Hadel, and (5) 2071 Los Angeles Avenue, Warren, Michigan (the Los Angeles property, together "the unsigned properties"), purchased for \$13,412.53 and titled in the name of DJH Investment Holdings, LLC, a limited liability company owned by Hadel.

required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. [*Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Regarding a summary disposition motion brought under MCR 2.116(C)(8):

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden*, 461 Mich at 119-120 (quotation marks and citations omitted).]

Finally, motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court “reviews a motion brought under MCR 2.116(C)(10) “by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party.” *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018). Summary disposition “is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

“There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party.” *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). “Only the substantively admissible evidence actually proffered may be considered.” *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted). “Circumstantial evidence can be sufficient to establish a genuine issue of material fact, but mere conjecture or speculation is insufficient.” *McNeill-Marks v Midmichigan Med Ctr-Gratiot*, 316 Mich App 1, 16; 891 NW2d 528 (2016). “This Court is liberal in finding genuine issues of material fact.” *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008).

The moving party has the initial burden to support its claim with documentary evidence but, once the moving party has met this burden, the burden then shifts to the nonmoving party to establish that a genuine issue of material fact exists. *AFSCME v Detroit*, 267 Mich App 255, 261; 704 NW2d 712 (2005). Additionally, if the moving party asserts that the nonmovant lacks evidence to support an essential element of one of his or her claims, the burden shifts to the nonmovant to present such evidence. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 7; 890 NW2d 344 (2016).

III. JUDICIAL ESTOPPEL

Plaintiff first argues that its claims regarding the Blackett property, the Lexington property, the Rosenbusch property, the Couzens property, the property located at 26501

Grandmont, the Capri property, the Chart property, and the North River were not barred by judicial estoppel. We disagree.

“Sometimes described as the doctrine against the assertion of inconsistent positions, judicial estoppel is widely viewed as a tool to be used by the courts in impeding those litigants who would otherwise play ‘fast and loose’ with the legal system.” *Paschke v Retool Indus*, 445 Mich 502, 509; 519 NW2d 441 (1994) (citation omitted). “Judicial estoppel is an equitable doctrine, which generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 479; 822 NW2d 239 (2012) (citations and quotation marks omitted). “Under the ‘prior success model’ of judicial estoppel, a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.” *Id.* (quotation marks omitted). Additionally, “[u]nder the ‘prior success’ model, the mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the court in the earlier proceeding accepted that party’s position as true.” *Paschke*, 445 Mich at 510.

In the context of bankruptcy proceedings,

to support a finding of judicial estoppel, [a reviewing court] must find that: (1) [the plaintiff] assumed a position that was contrary to the one that [t]he asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff’s] omission did not result from mistake or inadvertence. In determining whether [the plaintiff’s] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff’s] “attempts” to advise the bankruptcy court of [the plaintiff’s] omitted claim. [*Spohn*, 296 Mich App at 480-481 (alterations in original; citation omitted).]

The Bankruptcy Code, 11 USC 101, *et seq.*, “requires a debtor to file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor’s financial affairs.” *Spohn*, 296 Mich App at 481. A debtor must also disclose any potential cause of action, even if the potential cause of action is only “contingent, dependent, or conditional.” *Id.* at 482. Additionally, “[t]he duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action.” *Id.* (citation and quotation marks omitted; alteration in original).

Plaintiff stated in its bankruptcy disclosures that the “present value” of its written and oral contracts for a share of the profits generated from the sale of real estate, including the contracts at issue here, was zero dollars. Plaintiff disclosed to the bankruptcy court that it had real estate contracts with Hadel for the Blackett property, the Lexington property, the Rosenbusch property, the Couzens property, the property located at 26501 Grandmont, the Capri property, and the Chart property. However, plaintiff failed to disclose that it had a contract for

the North River property, or that it had any reserved causes of action against defendants. By approving plaintiff's disclosure statement, the bankruptcy court adopted plaintiff's disclosure statement, and plaintiff's position presented therein. Yet subsequently, in its complaint in this action, plaintiff alleged that its contracts with Hadel *did* have a value of more than zero dollars. Plaintiff never updated its bankruptcy disclosure statement to reflect the value of the contracts here, or the purchase of the North River property, despite a continuing duty to do so. *Spohn*, 296 Mich App at 482. Thus, judicial estoppel bars plaintiff's claims, unless its failure to disclose was a mistake. *Spohn*, 296 Mich App at 481.

We cannot conclude that plaintiff's failure to disclose was by mistake. The record before us is clear that plaintiff was aware of the contracts between itself and Hadel, as well as the purchase of the North River property, at the time it filed its disclosure statement in the bankruptcy court. Plaintiff may not have had knowledge of the *value* of the contracts at the time the disclosures were made, but it was aware of the contract's existence and of its potential claims against defendants.

When a party fails to properly disclose assets or claims in bankruptcy disclosures, a presumption exists that the party had a motive for concealment. *Spohn*, 296 Mich App at 485. "[A] presumption regarding a motive to conceal exists because [i]t is always in a [bankruptcy] petitioner's interest to minimize income and assets in order to secure payment directly rather than to the debtor's estate." *Id.* (citation and quotation marks omitted; second alteration in original). When considering whether a party had a motive to conceal, "the issue is not whether the plan would ultimately have been any different but, rather, whether there is sufficient evidence to demonstrate that [the party] was trying to retain assets that rightfully belonged to the estate and that should have been within the control of the trustee." *Id.* at 486.

Plaintiff argues that it did not have a motive to conceal the values of the written contracts, rather, that the value of the contracts were unknown. However, in valuing the contracts at zero dollars, plaintiff successfully reduced its assets in the bankruptcy. Reduction of assets in a bankruptcy is always attractive to a debtor in bankruptcy, and constitutes motive to conceal the value of contracts. See *Spohn*, 296 Mich App at 485. Accordingly, we cannot conclude that plaintiff lacked motive to conceal the value of the contracts.

Finally, when determining whether the evidence indicated an absence of bad faith, "courts primarily examine a plaintiff's efforts to correct the bankruptcy schedules and to make the bankruptcy court aware of any initially undisclosed claims." *Spohn*, 296 Mich App at 487. There is no record evidence that plaintiff attempted to amend its disclosure statement to include its omitted claims against defendants, updated valuations of the contracts, or its interest in the North River property. We therefore also cannot conclude that plaintiff demonstrated the absence of bad faith.

Based on the foregoing, we conclude that the trial court did not err by judicially estopping plaintiff from pursuing its claims and granting summary disposition in favor of defendants.

IV. STATUTE OF FRAUDS

Plaintiff also argues that the trial court erred by finding the oral contracts were unenforceable under the statute of frauds because the oral contracts established that plaintiff would be paid commissions for real estate transactions. We agree that the statute of frauds precluded plaintiff from enforcing the agreement, but not for the reasons articulated by the trial court. Rather, we conclude that the agreement was unenforceable under the statute of frauds because it granted plaintiff an interest in land.³

“The starting point in analyzing oral statements for contractual implications is to determine the meaning that reasonable persons might have attached to the language, given the circumstances presented.” *Rowe v Montgomery Ward & Co, Inc*, 437 Mich 627, 640; 473 NW2d 268 (1991). Furthermore, “[t]he ‘overreaching principle of contract interpretation’ is that the court looks to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent.” *Id.* at 641. Plaintiff alleges that the terms of the agreement represent the terms of the oral contracts at issue in this case. Contracts attached to a pleading are considered part of the pleading. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003). To determine the terms of the agreement, we will rely on traditional contractual interpretation rules used for written contracts.

“In ascertaining the meaning of a contract, we give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument.” *Rory*, 473 Mich at 464. “A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases used in the contract.” *Auto Owners Ins Co v Seils*, 310 Mich App 132, 145; 871 NW2d 530 (2015). “[C]ontracts must be read as a whole,” *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 447; 886 NW2d 445 (2015), giving “effect to every word, phrase, and clause,” while taking pains to “avoid an interpretation that would render any part of the contract surplusage or nugatory,” *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

“The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud, and not as an instrumentality to be used in the aid of fraud or prevention of justice.” *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 526-527; 644 NW2d 765 (2002). In relevant part, MCL 566.132 states:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

* * *

³ Because the trial court reached the correct result, albeit for the wrong reasons, reversal is not warranted. *Lewis v Farmers Ins Exch*, 315 Mich App 202, 217; 888 NW2d 916 (2016).

(e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

Similarly, MCL 566.106 requires contracts establishing an interest in land to be in writing:

No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

Contracts that fall within any portion of the statute of frauds are unenforceable. See, e.g., *Kelly-Stehney & Assoc, Inc v MacDonald's Indus Prod, Inc*, 265 Mich App 105, 110-114; 693 NW2d 394 (2005) (holding that an oral contract was unenforceable because it fell within one portion of the statute of frauds). The writing requirement of the statute of frauds, however, “may be satisfied by several writings made at different times” and can also be satisfied by a series of writings, rather than one single writing establishing all the terms of the contract in question. *Id.* at 111-114.

Plaintiff and defendants agree some properties purchased by plaintiff on behalf of Hadel were purchased in accordance with the oral contracts. The terms of those oral contracts determine whether they fall within the statute of frauds. Two types of contracts that fall within the purview of the statute of frauds are relevant in this case: (1) contracts paying a commission for the sale of land, MCL 566.132(1)(e), and (2) contracts creating an interest in land, MCL 566.106. If the oral contracts fall within either of these areas then they fall within the statute of frauds and are unenforceable. See MCL 566.106; MCL 566.132; *Kelly-Stehney & Assoc, Inc*, 265 Mich App at 110-114.

Generally, “agreements to share profits and losses arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing.” *In re Handelsman*, 266 Mich App 433, 440; 702 NW2d 641 (2005) (citation and quotation marks omitted). However, the properties in this case have not been sold, and plaintiff is not attempting to collect a share of profits generated by the sale of a property. Instead, plaintiff is attempting to collect 50% of the properties’ equity values.

When used in terms of real property, Black’s Law Dictionary defines “equity” as “[t]he amount by which the value of or an interest in property exceeds secured claims or liens; the difference between the value of the property and all encumbrances on it.” *Black’s Law Dictionary* (11th ed); see also *Merriam-Webster’s Collegiate Dictionary* (11th ed) (defining equity as “the money value of a property or of an interest in a property in excess of claims or liens against it.”). As explained by our Supreme Court in *Lookholder v Ziegler*, 354 Mich 28, 36 n 7; 91 NW2d 834 (1958):

The general rule is, that the word “interest” is broader and more comprehensive than the word “title.” It embraces both legal and equitable rights.

It covers rights in property less than title thereto, rights different from title, rights which may be enforced, legal rights.

Interest, in common speech in connection with land, includes all varieties of titles and rights. When given its plain and natural meaning it comprehends estates in fee, for life and for years, mortgages, liens, easements, attachments, and every kind of claim to land which can form the basis of a property right. [Citations and quotation marks omitted.]

The agreement here purportedly established that plaintiff was entitled to 50% of the properties' equity values at the expiration of the agreement's five-year term, even if the properties were not sold. The agreement additionally established that plaintiff could record a claim of interest in the properties to "provide notice to third parties of [plaintiff's] interest in the [properties]." Based on the foregoing, the alleged agreement granted plaintiff an interest in the properties, and indeed, plaintiff is seeking 50% of the properties' equity. Thus, plaintiff's claim is premised on an interest in land, and falls within the statute of frauds. Accordingly, the trial court did not err by granting summary disposition to defendants because the statute of frauds rendered the agreement unenforceable.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark T. Boonstra
/s/ Anica Letica