STATE OF MICHIGAN

COURT OF APPEALS

GORMAN GOLF PRODUCTS, INC.,

Plaintiff/Counter-Defendant,

v

FPC, L.L.C. and FRANK JONNA,

Defendants/Counter-Plaintiffs/Third Party Plaintiffs-Appellees,

v

WALTER SABAT and HARRY WILBUR,

Third Party Defendants-Appellants.

UNPUBLISHED
September 22, 2011

No. 295201
Oakland Circuit Court
LC No. 06-074150-CH

GORMAN GOLF PRODUCTS, INC.,

Plaintiffs/Counter-Defendant-Appellee/Cross Appellant,

v

FPC, L.L.C. and FRANK JONNA,

Defendants/Counter-Plaintiffs/Third Party Plaintiffs-Appellants/Cross Appellees.

v

WALTER SABAT and HARRY WILBUR,

Third Party Defendants-Appellees,

and

UNKNOWN REAL PROPERTY PURCHASER,

Third Party Defendant.

No. 296274; 296671
Oakland Circuit Court
LC No. 06-074150-CH

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

This appeal deals with the frustrated and ultimately unsuccessful attempt to purchase the commercial real property where Gorman Golf Products, Inc. (Gorman) was located. We affirm in part, vacate in part and reverse in part.

In October 2001, Richard Jonna, on behalf of commercial real estate developer FPC, L.L.C. and Frank Jonna, approached Walter Sabat and Harry Wilbur, officers and 50 percent shareholders of Gorman, regarding an interest in purchasing the real property where Gorman was situated for the sum of one million dollars. A purchase agreement for the property was drafted on behalf of FPC and signed by Walter Sabat and Harry Wilbur on October 22, 2001. Sabat and Wilbur were anxious to sell the property as Gorman was in financial difficulty. Wilbur acknowledged that he signed the purchase agreement in an effort to pressure the other shareholders and "force a sale." Richard Jonna assumed that Sabat and Wilbur had the authority to bind Gorman to the purchase agreement, but he did not make any inquiry or seek validation of their authority to act on behalf of Gorman.

No steps were taken after effectuation of the purchase agreement to consummate this sale as Frank Jonna indicated that within months of the signing of the purchase agreement FPC "discovered that there was an issue with the . . . shareholders." On February 2, 2002, Wilbur forwarded to Richard Jonna a copy of a letter directed to Gorman shareholders Lynn Marr and Laura Sabat informing them of the offer to purchase and seeking their approval for the sale. The letter indicated that Walter and Sabat were 50 percent shareholders. On February 15, 2002, Frank Jonna forwarded correspondence to the attention of Sabat and Wilbur acknowledging the failure to obtain the necessary shareholder agreement for the purchase. On April 11, 2002, Frank Jonna signed and filed an Affidavit of Interest in Real Estate for the subject property with the Oakland County Register of Deeds. Although Wilbur and Sabat continued to engage in sporadic communication with FPC and its agents and tried to procure shareholder approval, no overt actions were taken to enforce the purchase agreement.

In the interim, Gorman and the Paul Lufty Group entered into negotiations to purchase this same property for $1,100,000. In March or April of 2006, while sale of the property to Lufty was pending, counsel for Gorman contacted Frank Jonna seeking his voluntary discharge of the affidavit of interest. Jonna initially refused in an attempt to force Gorman to speak with him before proceeding with the sale of the property to Lufty. Gorman then filed an action to quiet title and sought damages for slander of title. FPC filed a counter claim against Gorman and a third party complaint against Sabat and Wilbur. Within approximately two months of the initiation of litigation, Jonna voluntarily discharged the affidavit of interest on June 23, 2006. The majority of the parties' claims were dismissed on various motions for summary disposition and only Gorman's slander of title claim eventually proceeded to a bench trial. While litigation was in its initial stages, the written consent of all the Gorman shareholders was obtained approving the sale of the property to Lufty on July 27, 2006.

In Docket No. 295201, Wilbur and Sabat challenge the trial court's denial of case evaluation sanctions premised on the interest of justice exception. The case evaluation recommended an award of $5,000 in favor of FPC, with Wilbur and Sabat each responsible for payment of $500 of the award. Wilbur and Sabat accepted the case evaluation, but FPC rejected it. Subsequently, the trial court granted summary disposition in favor of Wilbur and Sabat on all of FPC's relevant claims. We review de novo the trial court's decision whether to grant case evaluation sanctions pursuant to the interest of justice exception as a question of law and review an award of attorney fees and costs for an abuse of discretion.[1] This Court also reviews a trial court's application of the interest of justice exception to the specific facts presented in a case for an abuse of discretion.[2]

Neither party disputes the eligibility of Wilbur and Sabat to an award of attorney fees premised on FPC and Jonna's rejection of the case evaluation and the subsequent grant of summary disposition in Wilbur and Sabat's favor. The point of contention is the applicability of the interest of justice exception to the mandatory award for having rejected a case evaluation.[3] In declining to award attorney fees to Wilbur and Sabat the trial court cited the interest of justice exception and determined the "intentional wrong" committed by Wilbur and Sabat in signing the purchase agreement, despite a lack of authority, coupled with the absence for FPC and Jonna of an "adequate remedy at law" triggered the exception.

The applicability of the interest of justice exception has typically been determined on a case-by-case basis[4] and is subject to the discretion of the trial court.[5] As the court rule fails to define what factors or circumstances constitute the term "interest of justice," courts have examined "'the language and purpose of the rule' for assistance in determining its meaning."[6] The term "interest of justice" is found in two separate court rules for use as an exception for the imposition of sanctions in the rejection of an offer of judgment[7] and case evaluation awards.[8] While the court rules are not identical, they are both deemed to share the same purpose "of deterring protracted litigation and encouraging settlements."[9] This Court has previously cautioned that when used to except the award of sanctions for rejection of a case evaluation the meaning of the term "interest of justice" "must not be too broadly applied so as to swallow the

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[1] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

[2] *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 374; 689 NW2d 145 (2004).

[3] MCR 2.403(O)(11).

[4] *Lamson v Martin (After Remand)*, 216 Mich App 452, 463; 549 NW22d 878 (1996).

[5] *Haliw v City of Sterling Heights*, 266 Mich App 444, 447; 702 NW2d 637 (2005).

[6] *Id.*, citing *Luidens v 63rd Dist Court*, 219 Mich App 24, 31; 555 NW2d 709 (1996).

[7] MCR 2.405(D)(3).

[8] MCR 2.403(O)(11).

[9] *Haliw*, 266 Mich App at 448.

general rule [mandating sanctions] and must not be too narrowly construed so as to abrogate the exception."[10] As a consequence,

> [T]he "interest of justice" exception should be invoked only in "unusual circumstances," such as where a legal issue of first impression or public interest is present, "'where the law is unsettled and substantial damages are at issue," "where there is a significant financial disparity between the parties, or "'where the effect on third persons may be significant.'" These factors are not exclusive. "'Other circumstances, including misconduct on the part of the prevailing party, may also trigger this exception.'"[11]

We find that the reasons provided by the trial court for application of the interest of justice exception are quite typical of litigation and do not comprise an "unusual circumstance." The fact that one or more of the parties involved in the underlying action allegedly committed a wrong that initiated this litigation cannot be construed as an unusual circumstance. To suggest that pre-litigation conduct is a determining factor in the application of the exception is contrary to case law indicating that the court rule "is trial-oriented."[12] Use of the exception in this matter is also inconsistent with need for caution in order to avoid its overly broad application.[13]

This is simply a failed real estate deal between private parties involving disputes pertaining to the apparent authority of agents. The claims involved in the litigation are not unique and certainly do not comprise matters of first impression or of significant public interest. While financial disparity between the parties may exist, there is no suggestion that any discrepancy is so disparate that it necessitates the court's intervention. Although the trial court determined that FPC and Jonna had no "adequate remedy at law," by itself this does not comprise such an unusual circumstance to compel application of the interest of justice exception given the stated purpose of the court rule "to shift the financial burden of trial onto 'the party who demands a trial by rejecting a proposed [case evaluation] award.'"[14] As the case did not involve any unusual circumstances warranting invocation of the interest of justice exception, the trial court erred in denying an award of attorney fees to Wilbur and Sabat.

In Docket No. 296274, FPC and Jonna contest the trial court's failure to recognize that Gorman's slander of title claim was void under the statute of limitations and in granting summary disposition in favor of Gorman on this claim. A trial court's ruling on a summary disposition motion is reviewed de novo to determine whether the moving party was entitled to

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[10] *Id.*, citing *Luidens*, 219 Mich App at 33.

[11] *Harbour v Correctional Med Servs, Inc*, 266 Mich App 452, 466; 702 NW2d 671 (2005) (citations omitted).

[12] *Haliw v City of Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005).

[13] *Haliw*, 226 Mich App at 448, citing *Luidens*, 219 Mich App at 33.

[14] *Allard v State Farm Ins Co*, 271 Mich App 394, 398; 722 NW2d 268 (2006) (citation omitted).

judgment as a matter of law.[15] The grant of summary disposition is proper when a "claim is barred because of . . . [the] statute of limitations."[16]

Although the trial court correctly noted that a one-year limitations period was applicable in slander of title actions[17], it denied summary disposition based on a Michigan Supreme Court decision rendered in 1889 indicating that "a claim for slander of title is a continuing tort and that the statute of limitations period does not begin to run until the slander is removed."[18] It is undisputed that FPC and Jonna recorded the affidavit of interest on April 22, 2002, and voluntarily discharged the document on June 23, 2006. In determining that the slander of title action was not barred by the limitations period, the trial court relied on the fact that "[t]he affidavit in this case was not removed until after [Gorman] filed its complaint."

There is no legitimate dispute regarding the proper limitations period for actions pertaining to slander. The limitations period is governed by statute, which indicates:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
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> * * *
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> (9) The period of limitations is 1 year for an action charging libel or slander.[19]

Case law has determined that the limitations period for slander of title claims is the same time period applicable for all actions for libel and slander.[20] As there is no reasonable contention regarding the propriety of applying the one-year limitations period, the dispute herein centers on when the claim accrues.

In accordance with statute:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim

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[15] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[16] MCR 2.116(C)(7).

[17] *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 471; 487 NW2d 807 (1992).

[18] *Chesebro v Powers*, 78 Mich 472, 479; 44 NW 290 (1889).

[19] MCL 600.5805.

[20] See *Grist v Upjohn Co*, 1 Mich App 72, 80; 134 NW2d 358 (1965); *Bonner*, 194 Mich App at 470.

> accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.[21]

As no specific statutory provision addresses accrual for a slander of title action, the accrual for such claims occurs "at the time the wrong upon which the claim is based was done."[22] Case law has recognized:

> The right of action accrues from the time of publication. The time within which an action for libel or slander must be commenced is usually fixed by statute, and there can be no legal trial of such an action while a plea by defendant of the statute of limitations remains unanswered and undisposed of. The general rule is that the statute begins to run from the time when the defamation is published, even though the person defamed has no knowledge thereof until some time afterward; and this, it has been intimated, even though plaintiff's ignorance may be due to fraud on the part of defendant.
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> Admissions or repetitions. When a right of action for slander has been once barred by the statute of limitations, it cannot be revived by an admission of defendant that he did utter the slanderous words, *nor can the running of the statute be prevented by repetitions of the slander*, although of course a separate action will lie for any repetition within the statutory time.[23]

In denying summary disposition, the trial court relied on case law indicating that in slander of title actions that the ongoing nature of the defamation evidenced a "continued claim of rights in the premises under a deed from that time forth up to within a few months of the commencement of the suit was a continuing grievance . . . ."[24] Our Supreme Court has since specifically rejected the "continuing violations doctrine" finding it "contrary to" the statutory language governing limitations periods.[25] While the case rejecting the continuing violations doctrine involved employment discrimination, the ruling was not limited to such cases and addressed the plain text of the limitations and accrual statutes.[26]

The trial court also failed to recognize an important distinction that has historically existed in case law pertaining to the continuing violations doctrine. "The continuing-wrongful-

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[21] MCL 600.5827 (footnote omitted).

[22] *Id.*

[23] *Grist*, 1 Mich App at 81 (quotation marks and citations omitted, emphasis in original).

[24] *Chesebro*, 78 Mich at 479.

[25] *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005), amended 473 Mich 1205 (2005), citing MCL 500.5805.

[26] *Terlecki v Stewart*, 278 Mich App 644, 655; 754 NW2d 899 (2008). [We acknowledge that this case was decided eight months after the trial court rendered its decision on the summary disposition motion.]

acts doctrine states that [w]here a defendant's wrongful acts are of a continuing nature, the period of limitation will not run until the wrong is abated; therefore, a separate cause of action can accrue each day that defendant's tortious conduct continues."[27] But, as this Court has previously explained, "In seeking to apply the continuing-wrongful-acts doctrine . . . plaintiffs misapprehend the crux of the doctrine: a continuing wrong is established by continual tortious *acts*, not by continual harmful effects from an original, completed act."[28] In this instance, the wrongful act occurred with the filing of the affidavit of interest. Withdrawal of the affidavit is immaterial to the accrual of the limitations period and is only significant if the case was timely filed in assessing the duration and amount of possible damages. The filing of the affidavit constituted a wrongful tortious act. The mere fact that the affidavit continued to be in effect does not constitute additional or continuing wrongful acts, but must be distinguished as simply a "continual harmful effect[] from an original, completed act."[29]

The timeliness of Gorman's claim for slander of title "is determined by the plain text of MCL 600.5805[9]." Because there is no statute extending the limitations period of one-year, accrual occurred "at the time the wrong upon which the claim is based was done regardless of the time when damage results."[30] We find that the statute of limitations on this claim had expired by the time Gorman filed its complaint and should have been dismissed by the trial court rather than proceeding to trial.

Gorman asserts an alternative basis for affirmance by asserting that the proper limitations period is six years. Gorman reaches this conclusion by indicating that the statutory definition of slander of title[31] fails to contain a specific limitations period and thus is governed by a catch-all statutory provision, which states: "All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes."[32] The argument is simply wrong as a specific statutory provision assigns a one-year limitations period for actions "charging libel or slander."[33] Case law has also specifically recognized that the statute of limitations period applicable to slander of title actions is one-year.[34] Based on the clear statutory language and case law, Gorman's argument regarding the applicability of a six-year limitations period for this claim is unsupportable.

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[27] *Attorney General v Harkins*, 257 Mich App 564, 572; 669 NW2d 296 (2003), citing *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 592 NW2d 112 (1999), quoting *Horvath v Delida*, 213 Mich App 620, 626; 540 NW2d 760 (1995).

[28] *Id.* at 626.

[29] *Id.*; see also *Terlecki*, 278 Mich App at 655-657.

[30] MCL 600.5827.

[31] MCL 565.108.

[32] MCL 600.5813.

[33] MCL 600.5805(9).

[34] See *Bonner*, 194 Mich App at 470.

FPC and Jonna also assert error regarding the alleged failure of the trial court to thoroughly address their contentions regarding apparent authority. "Under fundamental agency law, a principal is bound by an agent's actions within the agent's actual or apparent authority."[35] "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and cannot be established only by the acts and conduct of the agent."[36] The elements comprising apparent agency consistent of the following: (1) the individual interacting with the agent must act with a reasonable belief in the agent's authority, (2) such belief must be generated by some act or neglect of the part of the principal, and (3) the individual relying on the agent's apparent authority must not be guilty of negligence.[37] "When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it."[38] An agreement can be ratified by a principal if the principal elects to treat the actions of their agent as being authorized or by behaving in a manner that can be justified only if the principal considers the acts as being authorized.[39] As an example, ratification by a principal would include the acceptance of the benefits of an agreement "with knowledge of the material facts."[40]

FPC and Jonna failed to provide any evidence to support their contention that Gorman acted to instill in FPC and Jonna a belief that Wilbur and Sabat possessed the requisite authority to contract the sale. In fact, the evidence shows that three to four months after Wilbur and Sabat signed the purchase agreement, FPC and Jonna knew they lacked the actual authority to contract for the sale of the property. FPC and Jonna base their arguments pertaining to apparent authority solely on the actions of Wilbur and Sabat. They point to no affirmative act by Gorman that would provide a reasonable belief to confirm that the agents had the type of authority implied by Wilbur and Sabat's signing of the purchase agreement. FPC and Jonna also failed to demonstrate any ratification by Gorman of the purchase agreement or the receipt of any benefit. Gorman received no money and the purchase agreement, when viewed in the context of the affidavit of interest and subsequent litigation, comprised a detriment interfering with Gorman's ability to sell the property.

The mere fact that Wilbur and Sabat were the most visible shareholders in the business does not allow the leap in logic by FPC and Jonna to assume that they had the authority to

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[35] *James v Alberts*, 464 Mich 12, 15; 626 NW2d 158 (2001).

[36] *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995); see also, *VanStelle v Macaskill*, 255 Mich App 1, 10; 662 NW2d 41 (2003).

[37] *Id*. at 9-10.

[38] *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 431; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005), quoting *David v Serges*, 373 Mich 442, 443-444, 129 NW2d 882 (1964).

[39] *Id*.

[40] *Echelon Homes, LLC*, 261 Mich App at 432 (citation omitted).

conduct more than the day-to-day transactions for the business extending to the authorization of the sale of Gorman's only major asset. "It is hornbook learning that because one is an agent for one purpose he is not an agent for all."[41] FPC and Jonna share responsibility for any purported reliance on the alleged apparent authority of Wilbur in Sabat based on the acknowledgement that they took no steps to verify such authority. Wilbur and Sabat lacked the authority to bind Gorman to the sale of the property despite the wording of the purchase agreement. Gorman did not ratify this action as evidenced by their failure to proceed with any steps affirming the sale.

FPC and Jonna also challenge the trial court's ruling pertaining to the statute of frauds. "'This Court reviews de novo questions of law such as whether the statute of frauds bars enforcement of a purported contract.'"[42]

For a contract to sell land to be enforceable it must be in writing and signed by the seller.[43] The trial court correctly determined that Wilbur and Sabat lacked the authority to convey the property on behalf of Gorman. An agent's authority to contract for the principal must be determined from the acts of the principal and cannot by proven merely based on the statements of the alleged agent.[44] Wilbur and Sabat did not possess the requisite authority to bind Gorman to the purchase agreement. As explained by our Supreme Court, "[c]ontracts conveying an interest in land made by an agent having no written authority are invalid under the statute of frauds unless ratified by the principal ['s]" affirmative or "distinct act of ratification."[45] Based on the legal principles involved, the purchase agreement simply was not valid under the statute of frauds because it was not ratified by Gorman.

We decline to address FPC and Jonna's assertion of error regarding the trial court's rejection of their claim of tortious interference with a business relationship and expectancy as their failure to cite legal authority has effectively resulted in a waiver.[46]

Finally, in Docket No. 296671, Gorman contends the trial court failed to award it all of its actual attorney fees and that it is also entitled to appellate fees. We need not address this argument based on finding that Gorman's slander of title claim was precluded by expiration of

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[41] *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958).

[42] *Kelly-Stehney Assoc Inc v MacDonald's Indus Prod, Inc (On Remand)*, 265 Mich App 105, 110; 693 NW2d 394 (2005), quoting *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

[43] MCL 566.108.

[44] *Rohe Scientific Corp v Nat'l Bank of Detroit*, 133 Mich App 462, 469; 350 NW2d 280 (1984), mod on other grounds 135 Mich App 777 (1984).

[45] *Forge v Smith*, 458 Mich 198, 208-209; 580 NW2d 876 (1998) (citation omitted).

[46] *Badiee v Brighton Area Sch*, 265 Mich App 343, 379; 695 NW2d 521 (2005), citing *Conlin v Scio Twp*, 262 Mich App 379, 384; 686 NW2d 16 (2004).

the applicable limitations period. "An issue is moot if an event has occurred that renders it impossible for the court to grant relief."[47]

We reverse the trial court's denial of attorney fees and costs to Wilbur and Sabat premised on the interest of justice exception and remand to the trial court for further proceedings consistent with this opinion. We vacate the trial court's ruling on Gorman's slander of title claim based on preclusion by the applicable one-year statutory limitation period and vacate the award of attorney fees in favor of Gorman based slander of title. We affirm the trial court's grant of summary disposition on FPC and Jonna's claims pertaining to apparent authority, tortious interference with a business relationship or expectancy, and regarding the applicability of the statute of frauds. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[47] *Attorney General v Pub Serv Comm*, 269 Mich App 473, 485; 713 NW2d 290 (2005).