STATE OF MICHIGAN

COURT OF APPEALS

RONALD W. LECH II,

Plaintiff/Counter-Defendant-Appellant,

V

HUNTMORE ESTATES CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff-Appellee,

and

JACOBSON ORE CREEK LAND DEVLOPMENT, L.L.C., and SCOTT R. JACOBSON, d/b/a S.R. JACOBSON LAND DEVELOPMENT L.L.C.,

Defendants-Appellees.

UNPUBLISHED
October 6, 2011

No. 296489
Livingston Circuit Court
LC No. 08-024045-CH

RONALD W. LECH II,

Plaintiff/Counter-Defendant-Appellant,

V

HUNTMORE ESTATES CONDOMINIUM ASSOCIATION,

Defendant/Counter-Plaintiff,

and

JACOBSON ORE CREEK LAND DEVLOPMENT, L.L.C., and SCOTT R. JACOBSON, d/b/a S.R. JACOBSON LAND DEVELOPMENT L.L.C.,

No. 297196
Livingston Circuit Court
LC No. 08-024045-CH

Defendants-Appellees.

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

In Docket No. 296489, plaintiff appeals as of right the trial court's grant of summary disposition in favor of defendants Huntmore Estates Condominium Association ("the Association"), Jacobson Ore Creek Land Development, L.L.C. and Jacobson Land Development L.L.C. ("the Jacobson defendants").[1] On appeal, plaintiff asserts that summary disposition was improper regarding each count of his complaint. Plaintiff further asserts that the trial court erred in denying his motion to amend his complaint. We affirm in part, reverse in part and remand for further proceedings.

In Docket No. 297196, plaintiff appeals as of right the trial court's grant of the Jacobson defendants' motion for attorney fees and costs pursuant to MCR 2.405. On appeal, plaintiff contends that the trial court erred in awarding fees and costs. Alternatively, plaintiff contends that the award was excessive. We vacate.

I. Grant of Summary Disposition

Plaintiff first asserts that the trial court erred in concluding that each defendant was entitled to summary disposition regarding each count of plaintiff's complaint. We conclude that the trial court erred in granting the motions for summary disposition regarding Counts I, II and IV of plaintiff's complaint. The trial court properly granted defendants summary disposition regarding Counts III and V of plaintiff's complaint.

A. Standard of Review

This Court reviews a trial court's decision regarding summary disposition pursuant to MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper when, upon examining the affidavits, depositions, pleadings, admissions and other documentary evidence, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1997). Additionally, in reaching its decision, the trial court was confronted with a contractual agreement. "The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006). Finally, the trial court's decision was also the product of statutory

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[1] This Court will refer to Jacobson Ore Creek Land Development, L.L.C. and Jacobson Land Development, L.L.C. as the Jacobson defendants as each entity is a corporate entity affiliated with Scott R. Jacobson and plaintiff's allegations are equally applicable to each entity.

interpretation, which this Court reviews de novo. *Esselman v Garden City Hospital*, 284 Mich App 209, 216; 772 NW2d 438 (2009).

B. Preliminary Considerations

The trial court granted each defendant summary disposition on each of the five counts in plaintiff's complaint. We will address each count of the complaint in turn. However, prior to addressing each count specifically, we will first address some of the defenses that plaintiff must overcome in order for each of his counts to survive summary disposition.

To begin, plaintiff's entire complaint is premised on his conclusion that he posses all of the rights that LANS previously possessed due to his status as an assignee and that those rights were violated by the various defendants through the levying of certain assessments and the subsequent filing of liens. Therefore, this Court must first determine whether plaintiff actually possessed the rights of LANS. While plaintiff asserts that he should be afforded each of the rights originally granted to LANS, he offers little support for the notion that he is an assignee. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt v Bailey*, 260 Mich App 636, 653; 680 NW2d 453 (2004). This Court has previously stated that, in order to create an assignment, "there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned." *Weston v Dowty*, 163 Mich App 238, 242; 414 NW2d 165 (1987).

In the present case, there was never an express agreement between LANS and plaintiff that resulted in plaintiff becoming an assignee. Plaintiff never reached any form of agreement with LANS. Rather, plaintiff's status was conferred by the court because he was a judgment creditor of LANS and received the right to the LANS units after the Jacobson defendants initiated an interpleader action in the lower court. The Jacobson defendants filed an interpleader complaint to determine who was "lawfully entitled to exercise the rights of LANS." The court responded by awarding the units to various individuals, including plaintiff. It does not appear that the Jacobson defendants ever took the position that the successors to the LANS interest would not have all of the rights that LANS was granted. Further, the Jacobson defendants never took issue with the lower court's disposition of the interpleader complaint. Where the interpleader complaint specifically stated that defendants sought the identity of the individuals who possessed the rights of LANS, we hold that it would be improper to conclude that the successors to LANS did not possess all of those rights where the trial court gave no indication that it was not granting defendants the relief they requested.

Because we conclude that plaintiff has the right to enforce the terms of the LANS agreement, it is necessary to determine whether the terms of that agreement have been violated. If the terms have not been violated, it is clear that several counts of plaintiff's complaint cannot survive, as they are dependent on the assessments being improper. The terms in question explicitly provide that the units in question could not be subject to any encumbrance unless the same encumbrance was "applicable to all units in the phase." Plaintiff asserts that defendants were precluded from assessing plaintiff's units because it did not also assess the units owned by the Jacobson defendants. Defendants contend that the LANS agreement was never violated. According to defendant's, the assessments in question were "applicable to all units of the phase"

and defendants were merely relieved of their responsibility to *pay* the assessments by operation of the master deed and bylaws.

We reject defendants' argument regarding whether the LANS agreement was violated because it is dependent on a tortured interpretation of the term "applicable." As this Court has explained, it is appropriate to consult a dictionary to determine the common meaning of a word used in a contract. *Vushaj v Farm Bureau Insurance Co of Michigan*, 284 Mich App 513, 515; 773 NW2d 758 (2009). Random House Webster's College Dictionary (1995) defines "applicable" as "relevant; suitable; appropriate." There is no dispute that the Master Deed provides that any unit owned by the developer during the development and sales period is not subject to an assessment. Therefore, during that period of time, an assessment is not relevant, suitable or appropriate in regard to any units defendants own. There is no language in Paragraph 11 that allows for an exception, no matter how temporary, to the provision that no assessments may be levied against those units. The language of the controlling agreement is unambiguous. Defendants violated the agreement when they permitted plaintiffs units to be assessed despite the fact that the vast majority of units in the development were not subject to the same assessment.

As described above, we have concluded that plaintiff possessed the rights of LANS and that the assessments in question constitute a violation of those rights. Defendants argue that, nonetheless, liability is improper. The Jacobson defendants contend that they cannot be held liable for the actions of the Association because it is a distinct entity. Likewise, the Association contends that its actions were statutorily permitted and that, because it is a distinct corporate entity from the Jacobson defendants, it cannot be held liable for any breach of the LANS agreement.

Whether to pierce the corporate veil is a fact intensive decision which rests in the sound, equitable discretion of the trial court. *Herman v Mobile Homes Corp*, 317 Mich 233, 243; 26 NW2d 757 (1947). A presumption exists under Michigan law that the corporate form will be respected. *Seasword v Hilti*, 449 Mich 542, 547; 537 NW2d 221 (1995). The discussion of this issue by the parties at the trial and appellate level was less than thorough. Additionally this is not an issue on which the trial court has offered its analysis after complete briefing and argument. In this case, the parties have not adequately addressed whether disregarding the corporate veil is appropriate, and because we presume the corporate entities are valid, and because it is a fact intensive determination to set that presumption aside, we will allow the trial court to make that determination on remand.

C. Count I

Having determined that none of the initial defenses offered by defendants are fatal to plaintiff's complaint, we will address each count of the complaint in turn. Count I of the complaint alleged common law slander of title. The parties agree that "[t]o establish slander of title at common law, a plaintiff must show falsity, malice, and special damages, i.e., that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998).

Plaintiff's theory regarding falsity, the first prong of the cause of action, is that defendants were not entitled to file the liens in question because those liens conflicted with the express terms of the LANS agreement. It appears that this was likely the prong that the trial court relied on in granting summary disposition, though the court never expressly stated such. As described above, plaintiff has adequately demonstrated the element of falsity. Defendants were contractually precluded from assessing plaintiff's units because they failed to assess all of the units in the development. The liens in question were filed after plaintiff failed to pay the improper assessments. Therefore, because the validity of the liens is dependent on the validity of the assessments, plaintiff has demonstrated the first element of his common law slander of title claim.

Next, plaintiff must demonstrate that the liens that were falsely filed were also filed with malice. As this Court stated in, *Sullivan v Thomas Organization, PC*, 88 Mich App 77, 86; 276 NW2d 522 (1979), which was a case involving a disparagement of title claim, "[m]alice may not be inferred simply from the filing of an invalid lien; plaintiffs must show that defendants knowingly filed an invalid lien with the intent to cause plaintiffs injury." Furthermore, malice may be demonstrated through circumstantial evidence. *Id*.

In order to establish the element of malice, plaintiff's complaint alleged that the liens in question were imposed as retribution when plaintiff ceased business negotiations with defendants. Specifically, plaintiff alleged that defendants approached him to negotiate for the purchase of one of his units in June 2008. The negotiations broke down and the liens were filed in July 2008. At the motion hearing on the first motion for summary disposition, the trial court concluded that plaintiff's allegations created a genuine issue of material fact regarding malice. In contrast, defendants argue that malice cannot be established because the liens in question were not wrongly filed. Defendants further argue that although the liens were not filed until July 2008, they were initially discussed internally several months prior to the alleged negotiations with plaintiff.

There remains a genuine issue of material fact relating to the element of malice. As describe above, to show malice plaintiff must demonstrate that defendants knowingly filed invalid liens with the intent of injuring plaintiff. We have already concluded that the liens in question are invalid. It is reasonable to conclude that defendants knew that the liens were invalid, as there is no dispute that they were aware of the existence of the LANS agreement. Furthermore, it could be concluded that defendants intended to hurt defendant with the filing of the invalid liens. Although plaintiff's evidence regarding defendant's intent is purely circumstantial, this Court has established that circumstantial evidence is sufficient when establishing malice. *Sullivan*, 88 Mich App at 86. Further, although defendant has offered evidence to show that the liens were contemplated prior to the breakdown of negotiations, the fact remains that the liens were not filed until after those negotiations ceased. Essentially, determining whether defendant intended to hurt plaintiff involves a determination of credibility, which is a task best reserved for a finder of fact.

Finally, plaintiff must establish that he suffered special damages. In arguing that he suffered such damages, plaintiff improperly relies on *Pattern Corp v Canadian Lakes Development*, 788 F Supp 975 (WD MI 1995), which is not binding on this Court. This Court did describe what constitutes special damages in *Sullivan*, when it held that a plaintiff who had

been wrongfully subjected to a cloud on his title and had incured attorney fees and costs had suffered special damages. *Sullivan*, 88 Mich App at 85. The plaintiff in this case allegedly incurred the same type of damages. Therefore, it follows that the trial court improperly granted defendants summary disposition regarding Count I of the complaint.

D. Count II

Count II of plaintiff's complaint alleged statutory slander of title pursuant to MCL § 565.108, which provides

> 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.

In regard to a statutory slander of title claim, this Court has stated that "[t]he elements of slander of title are falsity of statement and malice. 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." *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990) (internal citations omitted). Therefore, the elements of Count II of the complaint are satisfied for the reasons discussed regarding Count I of the complaint. Summary disposition was improperly granted.

E. Count III

In Count III of the complaint, plaintiff alleged statutory slander of title pursuant to MCL 565.25, which provides

> Sec. 25. (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:
>
> > (a) A full and fair accounting of the facts that support recording of the instrument of encumbrance and supporting documentation, as available.
> >
> > (b) Proof of service that actual notice has been given to the recorded landowner of the land to which the instrument of encumbrance applies.
>
> (2) Subsection (1) does not apply to any of the following
>
> ***

> (b) The filing of an instrument of encumbrance authorized by state statute or federal statute.
>
> ***
>
> (3) A person who is not exempt under subsection (2) who encumbers property through the recording of an instrument listed under subsection (1) without lawful cause with the intent to harass or intimidate any person is liable for the penalties set forth in section 2907a of the revised judicature act of 1961, 1961 PA 236, MCL 600.2907a.

As defendants argue, and as plaintiff recognizes, MCL 559.208 expressly permits a condominium association to file a lien when a unit owner fails to pay assessments. Defendants argue that plaintiff is consequently precluded from bringing Count III of his complaint due to the language of MCL 565.25(2)(b). In contrast, plaintiff argues that MCL 565.25(2)(b) is inapplicable in the present case because while condominium associations generally have the power to file liens in response to unpaid assessments, there was no such statutory power in this instance because the liens were improper.

Despite concluding that the Association improperly filed the liens in question, this Court is not persuaded by plaintiff's argument regarding Count III of the complaint. MCL 565.25(2)(b) explicitly provides that an encumbrance that is permitted under statute is not subject to MCL 565.25(1). The encumbrances at issue were permitted by state statute. The liens were not rendered improper by statute, but by operation of the LANS contractual agreement.

F. Count IV

Count IV of plaintiff's complaint alleged a statutory claim pursuant to MCL 559.215, a section of the Michigan Condominium Act. Pursuant to that provision, a condominium developer is liable for damages to a condominium owner if the developer violates MCL 559.184a, which mandates that a developer provide a purchaser with certain documents prior to the conveyance of the property. It is undisputed that the Jacobson defendants failed to provide plaintiff the required documents when they conveyed the units to plaintiff. Plaintiff asserts that he is statutorily entitled to damages. The Jacobson defendants contend that the statutory provision does not apply to plaintiff because plaintiff is not properly classified as a "purchaser" where he obtained his interest in the units by way of court order.

As the trial court initially found, plaintiff is properly classified as a purchaser with regard to unit 52, for which plaintiff paid $50,000 to the Jacobson defendants after being granted the option to purchase in the interpleader action. In granting defendant summary disposition regarding Count IV, the trial court provided no explanation of its reasoning. The parties do not cite, nor has this Court located, an exception to MCL 559.184a that is applicable to the purchase of unit 52. As a result, the trial court erred in granting defendants summary disposition on Count IV as it relates to unit 52. However, plaintiff's other two units were not purchased from the Jacobson defendants and are thus not covered by MCL 559.184a.

G. Count V

Count V of plaintiff's complaint alleged two distinct causes of action: tortious interference with a contract and tortious interference with a business expectancy. Specifically, plaintiff alleged that defendants intentionally interfered with plaintiff's agreement to sell unit 62 to John Donoghue. Although these two causes of action are legally similar, they are composed of different elements.

In order to establish a claim for tortious interference with a contract, a plaintiff must show "(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Health Call of Detroit v Atrium Home & Health Care Services, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005). Plaintiff asserts that when defendants informed Donoghue of the various restrictions on his newly purchased unit, Donoghue demanded rescission of the contract. However, plaintiff has presented no authority for the proposition that this Court will treat rescission as a breach for the purposes of a claim of intentional interference with a contract. More importantly, it does not appear that plaintiff's claim regarding rescission is legally accurate. Donoghue agreed to buy one unit from plaintiff for $110,000. There is no allegation that Donoghue failed to fulfill the terms of that agreement. Thereafter, Donoghue sold that property back to plaintiff for $95,000. Consequently, it appears that there were two different contractual agreements that occurred between Donoghue and plaintiff. While it may be true that the second contractual agreement resulted from defendants' actions, it cannot be accurately said that defendant caused a breach or rescission of the first agreement where no breach or rescission actually occurred. As a result, plaintiff cannot establish the elements of tortious interference with a contract and the trial court properly granted defendants summary disposition.

To establish the distinct cause of action for tortious interference with a business expectancy, a plaintiff must show

> (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call of Detroit*, 268 Mich App at 90.]

Unlike plaintiff's claim of intentional interference with a contract, the claims for interference with a business expectancy does not require a showing that there was an actual breach of contract. However, summary disposition was nonetheless proper because plaintiff cannot demonstrate that defendants interfered with his valid business relationship with Donoghue. While it is undeniable that plaintiff and Donoghue had a business relationship at the time plaintiff agreed to sell a unit to Donoghue, that transaction was completed prior to the actions of the various defendants. At that point, there was no continuing relationship between plaintiff and Donoghue. Consequently, there was no business relationship with which defendants could have interfered.

II. Motion to Amend

Next, plaintiff contends that the trial court erred in denying his motion to amend his complaint. We disagree.

A denial of a motion to amend a complaint is reviewed for an abuse of discretion. *Franchino v Franchino*, 263 Mich App 172, 189; 687 NW2d 620 (2004). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

After the trial court granted defendants' motions for summary disposition, plaintiff moved to amend his complaint. The proposed amendment would have indicated that plaintiff sought rescission as a remedy for the violation of the Michigan Condominium Act and would have also added a count alleging breach of contract on the part of the Jacobson defendants. Pursuant to MCR 2.118(A)(2), leave to amend a complaint should be freely granted "when justice so requires." "A motion to amend ordinarily should be granted, and should be denied only for the following particularized reasons: [1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . ." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997) (internal citation omitted).

The trial court apparently determined that the motion to amend was improper because plaintiff exercised undue delay and because any amendment would be futile. Regarding undue delay, this Court has explained that "[d]elay, alone, does not warrant denial of a motion to amend. However, a court may deny a motion to amend if the delay was in bad faith or if the opposing party suffered actual prejudice as a result." *Weymers*, 454 Mich at 659. In describing the concept of prejudice as it relates to undue delay, the *Weymers* Court stated:

> "Prejudice" in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits. Rather, "prejudice" exists if the amendment would prevent the opposing party from receiving a fair trial, if for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has been destroyed or lost. [Id.]

This Court further expounded on the concept of undue delay in *Amburgey v Sauder*, 238 Mich App 228, 247; 605 NW2d 84 (1999), in which it noted that an amendment to a complaint is improper if an undue delay was caused by bad faith. In *Amburgey*, the Court held that a motion to amend was properly denied where the plaintiff sought to amend only after the defendant was granted summary disposition as the timing of the motion to amend was indicative of bad faith.

In the present case, the trial court accurately noted that there was no reason why plaintiff's initial complaint could not have contained the content that he sought to add through the motion to amend. No factual or legal developments occurred during the ten month period between the filing of plaintiff's complaint and the filing of the motion to amend. As in *Amburgey*, it was not until after the trial court granted defendants summary disposition that plaintiff moved to amend his complaint. Based on the *Amburgey* decision, plaintiff exhibited

undue delay and that the timing of the motion to amend is indicative of bad faith. *Id*. at 248-249. Therefore, the trial court did not abuse its discretion in denying the motion to amend.

III. Award of Costs and Fees

In Docket No. 297196, plaintiff asserts that the trial court erred in granting defendants fees and costs and in calculating the amount of fees and costs to which defendants were entitled. Because we find that summary disposition was improperly granted, it follows that the grant of fees and costs must be vacated.

IV. Conclusion

In Docket No. 296489, we reverse in part, affirm in part and remand for further proceedings. We do not retain jurisdiction. In Docket No. 297196, we vacate the order awarding costs and fees.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens