STATE OF MICHIGAN

COURT OF APPEALS

CHARLES MICHAEL FIEBING and MONIKA H. FIEBING, Plaintiffs-Appellants, V RICHARD R. ERICKSON, MEREDITH J. ERICKSON, and PORT OF OLD MISSION ASSOCIATES, INC., Defendants-Appellees.	UNPUBLISHED July 26, 2011 No. 298433 Grand Traverse Circuit Court LC No. 09-027707-PD

Before: BECKERING, P.J., and FORT HOOD and STEPHENS, JJ.

PER CURIAM.

In this action seeking the recovery of personal property, plaintiffs appeal as of right from the trial court order granting summary disposition in favor of defendants, holding that plaintiffs abandoned their property. We reverse and remand.

I. FACTS

The relevant facts are not in dispute.[1] On May 9, 2003, plaintiffs purchased from defendants by land contract the property located at 1361 Silver Lake Road, Traverse City, Michigan. Plaintiffs failed to make all of the required payments, and defendants instituted a land contract forfeiture proceeding. At the hearing on September 9, 2009, the parties informed the district court that they had reached a settlement under which plaintiffs would vacate the residence by October 15, 2009, and the storage building located on the property by October 30, 2009, and would provide defendants with a quitclaim deed. The parties agreed that no judgment would be entered in the forfeiture proceeding if plaintiffs timely provided the deed to defendants.

[1] Defendants dispute plaintiffs' valuation of the personal property claimed by plaintiffs and do not concede that all of the listed items were on the premises when defendants took possession of the real estate. Those facts are not necessary for determination of the appeal as defendants concede that plaintiffs left behind at least some of the claimed items.

Plaintiffs admit that they did not timely vacate the property. Plaintiffs delivered the quitclaim deed to defendants on November 3 or 4, 2009. The deed states that its purpose "is to extinguish all rights of the [plaintiffs] arising pursuant to a Land Contract dated May 9, 2003 . . . ." Plaintiffs attempted to remove their personalty on November 3, 2009, but alleged that they were rebuffed by the individual defendants' daughter. Plaintiffs also asserted that they attempted to remove their property on November 9, 2009, but defendants' daughter arrived on the scene and prevented the removal.

Plaintiffs filed a complaint for claim and delivery on December 18, 2009. They claim that they left various tools and supplies worth $80,000 at the Silver Lake property, and that these items still belong to them. Plaintiffs moved for possession pending final judgment. At this hearing, plaintiffs' counsel stated that he was experiencing double vision and was having difficulty citing authority to the court. In response to authority cited by plaintiffs' counsel, the trial court stated, "Maybe the law does protect the lazy and incompetent." The trial judge also stated that he wondered why plaintiffs did not remove their property by October 30 (sic), but did not give plaintiffs the opportunity to explain or provide sworn testimony. Despite these deficiencies, the trial court proceeded to rule on the motion for possession. The court found that plaintiffs had abandoned any property left behind, because plaintiffs had agreed in the settlement of the forfeiture proceedings to remove all of their property. The trial court instructed plaintiffs' counsel to file a motion for reconsideration in light of his vision problems and representation that case law had been left at his office.

Plaintiffs filed a motion for reconsideration, and the trial court ordered defendants to file a response. In a written decision, the court denied plaintiffs' motion for reconsideration, holding that plaintiffs were estopped from challenging the prior settlement, that they had abandoned any personal property left behind, and had also extinguished any claims by the language of the quitclaim deed. The court also granted defendants attorney fees for having to defend the motion for reconsideration. Realizing that these orders effectively precluded plaintiffs from obtaining any relief in this case, defendants moved for summary disposition, and the trial court granted the motion. Plaintiffs now challenge the award of summary disposition and attorney's fees.

II. ABANDONMENT

Appellate review of a trial court's ruling on a motion for summary disposition is de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). A summary disposition motion under MCR 2.116(C)(8) tests the legal sufficiency of the claim based on the pleadings alone. *Wormsbacher v Phillip R Seaver Title Co, Inc*, 284 Mich App 1, 3; 772 NW2d 827 (2009). The motion should be granted only if "no factual development could possibly justify recovery." *Id*.

A motion under MCR 2.116(C)(10) tests the factual support of the claim. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The Court considers the evidence submitted in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). If the evidence does not establish a genuine issue of material fact, summary disposition is appropriate. *Id*. at 120.

The trial court found and defendants argue on appeal that plaintiffs are estopped from attempting to alter the terms of the settlement reached in the prior case between the parties. In general, the trial court's decision is based on a correct statement of the law. An agreement between the parties entered on the record in open court is binding except in cases of mistake, fraud, or unconscionable advantage. MCR 2.507(G); *Groulx v Carlson*, 176 Mich App 484, 488-489; 440 NW2d 644 (1989).[2] The first party to breach a contract may not sue another party for his subsequent breach or failure to perform. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). However, contrary to the trial court's decision, this rule is immaterial to the present case.[3] Plaintiffs are not suing defendants for a breach of the settlement agreement. Rather, they claim that defendants refused to allow plaintiffs to recover their personal property.

The terms of the settlement agreement called for plaintiffs to remove the property prior to October 31, 2009. Neither party stated that a breach of this term would cause defendants to become the owners of all personal property left on the premises, and defendants cite no authority to that effect. Defendants may have a right to damages under the settlement agreement if the presence of plaintiffs' personal property caused them harm somehow, but the settlement agreement does not support a claim that plaintiffs abandoned their property.

Defendants next point to the language of the quitclaim deed explaining that the deed's purpose "is to extinguish all rights of the [plaintiffs] arising pursuant to a Land Contract dated May 9, 2003 . . . ." Again, this language has no bearing on plaintiffs' personal property. Plaintiffs' rights to the property at issue in this case did not arise from the land contract, and therefore are not extinguished by the quitclaim deed. The land contract and quitclaim deed only involved real estate, not personal property. Similarly, plaintiffs attorney's statement that the settlement agreement would extinguish all parties' claims referred only to the real estate because at that point no personal property was in dispute.

Defendants finally argue that plaintiffs abandoned any property remaining on the premises after delivery of the quitclaim deed. Defendants raised the affirmative defense of abandonment and bear the burden of proving that plaintiffs abandoned their property. See *Ambs v Kalamazoo Co Road Comm*, 255 Mich App 637, 652; 662 NW2d 424 (2003). Proof of abandonment requires a showing of "intent to relinquish the property and external acts putting that intention into effect." *Id.* Nonuse by itself is insufficient to show abandonment. *Sparling*

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[2] At the time *Groulx* was decided the rule was found under MCR 2.507(H), but the text of the rule is identical. Defendants point out that no judgment was actually entered in the forfeiture proceeding, but the settlement agreement is nonetheless binding as it was made in open court.

[3] The trial court faulted plaintiffs for failing to comply with the settlement agreement. However, we note that the settlement agreement provided that the remedy for noncompliance would be entry of judgment. Although we do not have the benefit of the district court file, there is no indication that defendants returned to district court for entry of the judgment or filed a motion to enforce the settlement agreement in district court in light of the deadlines set forth in the settlement.

Plastic Indus, Inc v Sparling, 229 Mich App 704, 718; 583 NW2d 232 (1998). "Rather, nonuse must be accompanied by some act showing a clear intent to abandon." *Ludington & Northern R v The Epworth Assembly*, 188 Mich App 25, 33; 468 NW2d 884 (1991) (citations omitted).

The facts in this case are that plaintiffs agreed to vacate the real estate by October 31 and provide defendants with a deed. They provided the deed probably on November 3, and returned the same day to retrieve the property at issue here. Defendants argue that the signing of the deed coupled with the failure to remove all personalty before hand sufficiently proves abandonment. The trial court stated that it was "illogical to think that a grantor could execute a quit claim deed extinguishing all his or her rights to the realty, but still retain rights to enter upon the land and retrieve personal property." However, neither defendants nor the trial court could find any authority that directly supports this conclusion.

Simply handing over title to real estate is not a sufficient act to indicate intent to abandon valuable property. In *Cunningham v Kinyon*, 156 Mich 428; 120 NW 806 (1909), our Supreme Court noted that a conveyance of real estate did not necessarily include a conveyance of personal property located on the real estate, which it must include if granting a deed alone were sufficient to abandon that personalty. *Id.* at 431. The case did not involve the question of abandonment, but is otherwise similar to the present case in that it involved the conveyance of real estate and a subsequent dispute over the ownership of personal property left on the real estate. And surely it must on occasion happen that a grantor has forgotten certain items or simply not had time to remove them all. Carelessness or sloth should not be equated with intent to abandon.

Initially, the only issue before the court was plaintiffs' motion for possession. However, the trial court did not limit a ruling on possession pending resolution of the litigation, but proceeded to conclude that plaintiffs intended to abandon the property at issue. However, the intent to abandon was at odds with plaintiffs' assertions that they returned to remove more of their property on the same day they delivered the deed. The issues of intent and credibility present issues for the trier of fact to resolve. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). Summary disposition is generally inappropriate where motive and intent are at issue or where the credibility of a witness is crucial. *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). In addition, plaintiffs claim upwards of $80,000 in this lawsuit, and it is reasonable to infer that plaintiffs would not want to abandon such valuable property. See *Emmons v Easter*, 62 Mich App 226, 236-237; 233 NW2d 239 (1975). Moreover, intent to abandon is shown by nonuse plus an external act. *Ludington*, 188 Mich App at 33. It is not fair to say that this was a case of nonuse, because plaintiffs returned the same day to retrieve their property.

Delivery of the quitclaim deed may provide some support for a finding of intent to abandon, but it is not sufficient on its own. Where there is no nonuse of the property and where the property is valuable, the mere fact of conveyance of real estate does not prove abandonment

of the personalty. The undisputed facts as alleged in the pleadings do not support a finding that plaintiffs intended to abandon their property.[4]

Because the trial court erred in finding abandonment, it also erred in awarding attorney's fees to defendants. Plaintiffs' position was not frivolous.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

[4] Plaintiffs also argue that the trial court denied them the opportunity to properly argue the merits of the case. Defendants say plaintiff failed to preserve this question. This question is immaterial because of our finding that summary disposition was inappropriate.