

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JOSEPH P. GALASSO, JR., REVOCABLE  
LIVING TRUST,

UNPUBLISHED  
May 15, 2012

Plaintiff-Appellant,

v

No. 303300  
Oakland Circuit Court  
LC No. 2010-113334-PD

SURVEYBRAIN.COM, LLC and DAVID  
TURNER,

Defendants-Appellees,

and

MARK NALEPKA,

Defendant/Third-Party Plaintiff-  
Appellee,

and

KIMBERLY P. NALEPKA,

Defendant/Third-Party Defendant.

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Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

Plaintiff, Joseph P. Galasso Jr. Revocable Living Trust, appeals as of right from an order denying its motion for summary disposition and granting defendants, Surveybrain.com LLC, David Turner, and Mark Nalepka, summary disposition pursuant to MCR 2.116(I)(2). On appeal, plaintiff argues that the trial court erred in granting defendants summary disposition on the grounds that plaintiff's complaint for claim and delivery was deficient under MCR 3.105(C)(3), that the trial court erred in failing to sua sponte grant plaintiff leave to amend its complaint pursuant to MCR 2.116(I)(5), and that the trial court erred in denying plaintiff's motion for summary disposition. Because we conclude there are no errors requiring reversal, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

On December 4, 2003, plaintiff loaned \$123,883 to Mark Nalepka and his wife Kimberly. In executing the loan, Nalepka and Kimberly signed a “Promissory Note Line of Credit” and a “Security Agreement,” granting plaintiff an all asset security interest, including interests in stock in Surveybrain.com, LLC (the stock), as well as the software known as “Surveybrain.com,” and the source code for “Surveybrain.com” (software property). On September 15, 2010, plaintiff filed suit for claim and delivery against defendants after Nalepka defaulted on the loan. Nalepka filed a third-party complaint against Kimberly for contribution.<sup>1</sup>

According to plaintiff’s complaint, on August 4, 2009, Nalepka transferred most of his interest in the stock to Turner, Nalepka’s business partner and co-developer of the software. Then, on October 29, 2009, Nalepka filed a Chapter 7 Bankruptcy petition and subsequently received a discharge. On May 25, 2010, Turner transferred all of his ownership interest in the stock to Nalepka, leaving Nalepka the sole owner of the stock. However, Turner’s May 25, 2010 letter of sale concerning the stock explicitly provided that Turner retained his ownership interests in the software property.

Plaintiff moved the trial court for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). Plaintiff claimed that the security agreement Nalepka signed unambiguously secured its interest in the stock and the software property. Plaintiff also claimed that its motion for summary disposition should be granted pursuant to MCR 2.116(C)(9) because defendants failed to identify another party with an interest in the stock and the software property superior to plaintiff’s interest, defendants did not set forth any evidence indicating that the note was paid in full, and defendants’ only defense rested in the form of mere denials to the allegations in plaintiff’s complaint.

Defendants responded by first arguing that because the software and source code were an inseparable joint work under copyright law, Nalepka did not have the right to transfer possession of the software and source code because he was not the sole copyright owner. Defendants also claimed that they were entitled to summary disposition pursuant to MCR 2.116(I)(2) because plaintiff’s complaint was defective in that it failed to comply with the four elements that a complaint for claim and delivery must contain under MCR 3.105(C). Specifically, defendants argued that plaintiff’s complaint did not comply with the third requirement under MCR 3.105(C), which requires a plaintiff to “[s]tate if the property claimed is in an independent piece of property or a portion of divisible property of uniform kind, quality, and value.” Because plaintiff knew that Turner had an interest in the software property, defendants argued that plaintiff failed to meet the third requirement under MCR 3.105(C).

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<sup>1</sup> On January 19, 2011, the trial court entered an order granting Nalepka’s motion for summary disposition regarding contribution, holding that Nalepka was entitled to contribution from Kimberly. The trial court denied Kimberly’s motion for reconsideration.

On February 16, 2011, the trial court issued its opinion and order, denying plaintiff's motion for summary disposition and granting summary disposition in defendants' favor. The trial court found that summary disposition pursuant to MCR 2.116(C)(9) was inappropriate because defendants' defenses were not "so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery." The trial court also found that summary disposition pursuant to MCR 2.116(C)(10) was inappropriate because there was a genuine issue of material fact as to whether plaintiff was entitled to the stock and the software property pursuant to the security agreement.

The trial court found that summary disposition in favor of defendants was appropriate pursuant to MCR 2.116(I)(2) because plaintiff did not "state if the property claimed is an independent piece of property or a portion of divisible property of uniform kind, quality, and value" as required by MCR 3.105(C)(3).

Plaintiff's motion for reconsideration was denied. Plaintiff now appeals as of right.

## II. SUFFICIENCY OF PLAINTIFF'S COMPLAINT

Plaintiff argues that the trial court erred in granting defendants summary disposition pursuant to MCR 2.116(I)(2)<sup>2</sup> on the grounds that plaintiff failed to properly set forth its claim and delivery count in compliance with MCR 3.105(C)(3). We disagree.

The grant or denial of summary disposition is reviewed *de novo* to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Because MCR 3.105(C)(3) specifically addresses the contents of a plaintiff's complaint, we review the trial court's grant of summary disposition under MCR 2.116(C)(8), which provides that summary disposition will be granted when a party "has failed to state a claim on which relief can be granted." "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and allows consideration of only the pleadings." *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden*, 461 Mich at 119. Summary disposition is proper under MCR 2.116(C)(8) "only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery." *MacDonald*, 464 Mich at 332.

Where, as here, a plaintiff files a claim and delivery action,<sup>3</sup> MCR 3.105(C) provides that the complaint must:

- (1) specifically describe the property claimed;

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<sup>2</sup> MCR 2.116(I)(2) provides that: "[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party."

<sup>3</sup> The claim and delivery cause of action was formerly the common-law action of replevin. See MCR 3.105.

(2) state the value of the property claimed (which will be used only to set the amount of bond and not as an admission of value);

(3) state if the property claimed is an independent piece of property or a portion of divisible property of uniform kind, quality, and value; and

(4) specifically describe the nature of the claim and the basis for the judgment requested.

The trial court found that “plaintiff’s complaint is fatally deficient because it fails to properly plead a claim and delivery count” in that it failed to state the third criteria and that the property was not an independent piece of property or a portion of divisible property.

A claim and delivery action allows a party to recover possession of goods or chattels unlawfully detained. MCL 600.2920 (1). An action for claim and delivery may not be maintained except by a person, who at the time the action is commenced, has the right to possession of the goods or chattels at issue. MCL 600.2920(1)(c).

Plaintiff listed three specific pieces of property in paragraph eight of its complaint: Surveybrain.com stock, software known as “Surveybrain.com,” and the source code for Surveybrain.com. Plaintiff did not state that the stock was an independent piece of property as required under MCR 3.105(C)(3) because it did not provide a specific description of the Surveybrain.com, LLC stock or provide the trial court with necessary information for the transfer and ownership of the stock. Also, plaintiff’s complaint did not contain specific allegations concerning the nature of the software known as “Surveybrain.com,” and the source code for Surveybrain.com. Plaintiff did not allege in its complaint the extent of Nalepka’s interests in the software property, nor whether Nalepka’s interests in the software property were independent or divisible from the others’ interests in the software property such that plaintiff would be entitled to claim it and have it delivered. Again, MCL 600.2920(1)(c) requires an action to be maintained by a person who has a right to possession of the goods or chattels at issue. Plaintiff’s pleading, by not specifying that the software property was independent or divisible from another’s interests, failed to state a claim on which relief could be granted. *MacDonald*, 464 Mich at 332. Particularly, nothing in the complaint alleged that these items were independent pieces of property or portions of divisible property of uniform kind, quality and value.

Plaintiff claims that even if its allegations failed to meet the requirements of MCR 3.105(C)(3), the rule is a procedural one and does not affect the substance of what must be pleaded to survive a motion for summary disposition pursuant to MCR 2.116(C)(8). Plaintiff argues that a claim and delivery action is statutorily defined and cites MCL 600.2920.<sup>4</sup>

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<sup>4</sup> The full text of MCL 600.2920 provides:

(1) A civil action may be brought to recover possession of any goods or chattels which have been unlawfully taken or unlawfully detained and to recover damages

However, plaintiff's argument ignores that MCR 3.105(B) provides that "[a] claim and delivery action is governed by the rules applicable to other civil actions, except as provided in MCL 600.2920, and this rule." MCL 600.2920(1)(c) applies to this case and provides: "[a]n action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained." MCL 600.2920(1)(c) codifies the common-law rule that "[r]eplevin is a possessory action, and can only be maintained by a person entitled to the possession of the property claimed at the time of the commencement of the action." *Eldridge v Sherman*, 70 Mich 266, 269; 38 NW 255 (1888). In the context of MCL 600.2920(1)(c) and the common-law of replevin, MCR 3.105(C)(3) is a procedural rule that governs how a plaintiff should properly plead entitlement to the possession of the property claimed at the commencement of the action.

Plaintiff's failure to state that the claimed property was independent property or portions of divisible property as required by MCR 3.105(C)(3) prevented a finding on the pleadings that plaintiff, as opposed to any other, had a right to possession and delivery of the property. The trial court did not err in granting summary disposition to defendants pursuant to MCR 2.116(I)(2) because the plaintiff failed to state a claim on which relief could be granted under

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sustained by the unlawful taking or unlawful detention, subject to the following conditions:

(a) An action may not be maintained under this section to recover possession of or damages for goods or chattels taken by virtue of a warrant for the collection of a tax, assessment, or fine in pursuance of a statute of this state.

(b) An action may not be maintained under this section to recover possession of or damages for goods or chattels seized by virtue of an execution or attachment at the suit of the defendant in the execution or attachment unless the goods or chattels are exempted by law from execution or attachment.

(c) An action may not be maintained under this section by a person who, at the time the action is commenced, does not have a right to possession of the goods or chattels taken or detained.

(d) A writ, order, or process for delivery of goods or chattels before judgment may not be issued unless the court, after notice and a hearing and under procedures provided by rules of the supreme court, determines that the claim for recovery is probably valid and unless the party claiming a right to recover possession of the goods or chattels files a sufficient bond.

(2) A person who holds books or papers pertaining to an office and who is not the person in that office shall surrender them to the person entitled to that office. The person entitled to possession of the books and papers may bring an action to recover their possession. The court may order a person to show cause why he should not be compelled to deliver those books and papers and may order the delivery of the books and papers. [MCL 600.2920.]

MCR 2.116(C)(8) due to its failure to plead a right to possession to the property under MCR 3.105(C)(3) and MCL 600.2920(1)(c).

### III. LEAVE TO AMEND THE COMPLAINT

Plaintiff also argues that the trial court erred in failing to grant plaintiff leave to amend its complaint pursuant to MCR 2.116(I)(5). Because plaintiff did not actually seek leave to amend its complaint, the issue is unpreserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We are not obligated to consider unpreserved issues, but may elect to do so where the resolution of the issue is a question of law that may be determined on the facts presented. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

MCR 2.116(I)(5) provides that, “[i]f the grounds asserted [for summary disposition] are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified.”

Plaintiff claims that the trial court erred for failing to “grant” plaintiff leave to amend its complaint, yet plaintiff did not move the trial court for leave to amend its complaint. Plaintiff provides no support for the notion that the trial court should have sua sponte ordered an amendment of the complaint. Additionally, based on the facts of this case, we conclude that further amendment to plaintiff’s complaint would have been futile where plaintiff’s security interest became unperfected on February 13, 2010.

The security agreement granted plaintiff a security interest in “all tangible and intangible property, or mixed property, both now owned and hereinafter acquired . . .” Plaintiff originally perfected its security interest on February 14, 2005, and subsequently filed a continuation statement on June 2, 2009. Because plaintiff filed its continuation statement more than six months before it expired, its security interest became unperfected pursuant to MCL 440.9515, which provides, in relevant part:

(3) The effectiveness of a filed financing statement lapses on the expiration of the period of its effectiveness unless before the lapse a continuation statement is filed pursuant to subsection (4). *Upon lapse, a financing statement ceases to be effective and any security interest or agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest is perfected otherwise.* If the security interest or agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(4) A continuation statement *may be filed only within 6 months before the expiration of the 5-year period* specified in subsection (1) or the 30-year period specified in subsection (2), whichever is applicable. [(Emphasis added).]

In this case, six months before the five-year expiration would have been August 14, 2009. Because the second financing statement was filed prematurely on June 2, 2009, plaintiff’s security interest was unperfected. An action for claim and delivery may not be maintained except by a person, who *at the time the action is commenced*, has the right to possession of the

goods or chattels at issue. MCL 600.2920(1)(c). Given that Nalepka's personal obligation on the promissory note was discharged in bankruptcy and plaintiff no longer had a security interest in the collateral, an amendment of the complaint would have been futile.

#### IV. PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

Finally, plaintiff argues that the trial court erred in denying its motion for summary disposition pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). However, in light of our conclusion that the trial court properly granted summary disposition to defendants pursuant to MCR 2.116(I)(2), this issue is moot. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). "As a general rule, an appellate court will not decide moot issues." *Id.* Here, the trial court properly granted summary disposition to defendants because plaintiff failed to state a claim on which relief can be granted in its complaint. Accordingly, any review of plaintiff's request for summary disposition concerning defendants' defenses to its complaint cannot provide plaintiff relief. Nevertheless, we have reviewed plaintiff's claims that the trial court erred in denying its motion pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10) and find that plaintiff's claims of error are without merit.

Affirmed. As the prevailing parties, defendants may tax costs. MCR 7.219.

/s/ Kirsten Frank Kelly

/s/ Kurtis T. Wilder

/s/ Mark T. Boonstra