

STATE OF MICHIGAN
COURT OF APPEALS

FIRST METROPOLITAN TITLE COMPANY,
d/b/a METROPOLITAN TITLE COMPANY,

UNPUBLISHED
November 20, 2012

Plaintiff/Counter-Defendant/
Appellee,

and

RICHARD YBARRA, RICHARD K. YBARRA,
and DEBRA M. NIXON,

Plaintiffs,

v

JOHN S. BENCHICK, THE ESTATE OF JOHN
IRVIN BENCHICK, LESLIE C. BAVERMAN,
Personal Representative of the ESTATE OF JOHN
IRVIN BENCHICK, and HELEN BENCHICK,

Defendants/Counter-
Plaintiffs/Appellants.

No. 305973
Oakland Circuit Court
LC No. 2007-083476-CK;
2007-087941-CK

Before: JANSEN, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendants, John S. Benchick, Helen Benchick, and the estate of John I. Benchick,¹ appeal by right an order of the trial court granting plaintiff's, First Metropolitan Title Company's, request to dismiss defendant's counterclaim with prejudice and denying defendants' summary disposition motion in this slander of title and tortious interference action. On appeal, the Benchicks argue that title to 22003 Beck Road in Novi was slandered by a lis pendens First Metropolitan filed on the property. First Metropolitan filed the lis pendens after it filed an

¹ Because all three defendants share a last name, and two of the three defendants share a first name, we refer to John S. Benchick as "John S.," John I. Benchick as "John I.," and Helen Benchick as "Helen."

underlying complaint alleging that John S. violated the Uniform Fraudulent Transfer Act² (UFTA), by fraudulently transferring 22003 Beck Road to his parents, John I.³ and Helen, to hide assets from First Metropolitan, his creditor in yet another, separate action. On appeal, the Benchicks argue that the trial court erred when it concluded that First Metropolitan's lis pendens was justified, and not filed with malice. The Benchicks also argue that the trial court erred by determining that First Metropolitan's lis pendens did not amount to tortious interference with a contract to sell 22003 Beck Road. We disagree, and for the reasons set forth below, affirm.

I. STANDARD OF REVIEW

Appellate courts review “the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law.”⁴

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.⁵

Appellate courts review de novo issues of statutory construction.⁶

II. SLANDER OF TITLE

We conclude that the trial court did not err in determining that the Benchicks failed to establish slander of title. “To establish slander of title . . . 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.”⁷ Here, the Benchicks argue that First Metropolitan's lis pendens was unjustified, and was therefore a false statement that disparaged the property. The Benchicks also argue that the lis pendens was filed by First Metropolitan with malice. We disagree.

² MCL 566.31 *et seq.*

³ During the time period relevant to this litigation, John I. was alive, but has since died.

⁴ *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁵ *Id.* at 120.

⁶ *King v Ford Motor Credit Co*, 257 Mich App 303, 310; 668 NW2d 357 (2003).

⁷ *B & B Inv Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998).

A. THE VALIDITY OF THE LIS PENDENS

“A lis pendens is notice of what is involved in a suit.”⁸ More specifically, a notice of lis pendens is the “notice, recorded in the chain of title to real property . . . to warn all persons that certain property is the subject matter of litigation.”⁹ A notice of lis pendens:

[I]s designed to warn persons who deal with property while it is in litigation that they are charged with notice of the rights of their vendor’s antagonist . . . The effect of the filing of a notice of lis pendens is to cause after-acquired interests in the property to be taken subject to the outcome of the litigation.^[10]

MCL 600.2701(1) governs the conditions under which it is proper for a party to file a lis pendens. The statute states, in relevant part:

To render the filing of a complaint constructive notice to a purchaser of any real estate, the plaintiff shall file for record, with the register of deeds of the county in which the *lands to be affected* by such constructive notice are situated, a notice of the pendency of such action, setting forth the title of the cause, and the general object thereof, together with a description of the *lands to be affected* thereby.^[11]

“If the statutory language of the statute is unambiguous, then we assume that the Legislature intended its plain meaning, and the statute must be enforced as written.”¹² MCL 600.2701(1) is unambiguous. Under the statute’s plain terms, in order for the lis pendens to be valid, First Metropolitan was merely required to justify its filing with an underlying lawsuit which affected the property at 22003 Beck Road.

Here, the litigation underlying the lis pendens was its UFTA complaint, in which First Metropolitan alleged that 22003 Beck Road had been improperly transferred to Helen and John I. Michigan’s version of the UFTA specifies, in relevant part:

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation

⁸ *Ligon v City of Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007).

⁹ Black’s Law Dictionary (8th Ed.), p 950.

¹⁰ *Ruby & Assoc, PC v Shore Fin Services*, 276 Mich App 110, 113; 741 NW2d 72 (2007) (citations and quotations omitted), vacated in part on other grounds 480 Mich 1107 (2008).

¹¹ MCL 600.2701(1) (emphasis added).

¹² *Alvan Motor Freight, Inc v Dept of Treasury*, 281 Mich App 35, 39; 761 NW2d 269 (2008).

and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.^[13]

First Metropolitan's theory, when it filed its UFTA complaint, was that John S. either owned, or had an interest in, 22003 Beck Road, and fraudulently transferred it to Helen and John I. to hide his assets from collection on the judgment entered against him in the litigation arising from the transfer of property on Ranch Road in Rose Township. Helen responded by filing a counterclaim and summary disposition motion, in which she asserted that John S. never owned any interest in 22003 Beck Road. Instead, Helen argued, the transferors to John I. and Helen of 22003 Beck road were a couple named the Todors, and in June 2007, in exchange for 22003 Beck Road, John S. and Helen transferred to the Todors property located at 2670 Vero Drive, which John I. and Helen had owned since 2002.

However, there exists on the record considerable evidence that John S. had an interest in both 22003 Beck Road and 2670 Vero Drive prior to its transfer to Helen and John I. For example, Helen testified in her deposition that she and John I. had owned only two properties for 40 years: 148 Greenwood in Garden City, and a home on Beck Road. However, loan paperwork for the both the Vero Drive property and 22003 Beck Road indicated that John I. and Helen lived at Vero Drive for, alternatively, 20 months and four years. Moreover, John S. had referred to 2670 Vero Drive as "my" house for purposes of a lien assessed against the Vero Drive property. John S.'s driver license reflected his address as 22003 Beck Road. Additionally, John S. filed as a counter-plaintiff for slander of title to 22003 Beck Road, claiming that he was damaged by the *lis pendens*. John S.'s signature, and no one else's, appears on the purported purchase agreement related to 22003 Beck Road, and there is no indication that he was signing in a representative capacity. Finally, the warranty deed conveying 22003 Beck Road from the Todors to John I. and Helen listed only one dollar as consideration; indeed, according to First Metropolitan, this was the flag that caused it to become suspicious of the transfer. Accordingly, at the time it filed its *lis pendens*, First Metropolitan had a justifiable reason to believe, as the trial court correctly characterized it, that there were, at minimum, "a lot of irregularities in terms of the transfer" of 22003 Beck Road. Indeed, there was evidence that the property was transferred fraudulently. In short, First Metropolitan was justified in filing the *lis pendens* because it was justified in filing the underlying UFTA claim.

The Benchicks argue that First Metropolitan "had to prevail on its [UFTA] claims" and was required to "prove the existence of a fraudulent transfer" in its UFTA claim as conditions precedent to filing the *lis pendens*. We disagree, for three reasons. First, the Benchicks cite not

¹³ MCL 566.35.

one authority in support of this argument, and have accordingly abandoned it.¹⁴ Second, the trial court did not conclude that First Metropolitan's UFTA claim was meritless. Rather, the trial court concluded that John S.'s bankruptcy proceeding rendered First Metropolitan's UFTA claim moot—the trial court never reached the merits of First Metropolitan's UFTA claim. Third, the plain language of MCL 600.2701(1) requires merely that the party filing a lis pendens demonstrate that the subject property is “affected” by underlying litigation. The statute does not say that a lis pendens is valid only if the proponent of the underlying lawsuit is ultimately successful in the underlying litigation. Indeed, one of the very cases relied upon in the Benchicks' appellate brief explains:

Notice of lis pendens serves an important public purpose by protecting the right to litigation involving real property and protecting prospective purchasers by apprising them of disputes regarding rights in the land. These policies should not be thwarted by allowing the filing of a notice of lis pendens by an ultimately unsuccessful litigant to constitute grounds for a malicious prosecution action.^{15]}

Here, 22003 Beck Road was “affected” by First Metropolitan's justified UFTA claim. Accordingly, it was proper for First Metropolitan to file a lis pendens, “to warn all persons that [the] property is the subject matter of litigation.”¹⁶

The Benchicks also argue on appeal:

The only way [First Metropolitan] could possibly argue it had a right to lien the Beck Road properties was if it held a judgment against John S. Benchick. After obtaining a default judgment [against John S.] in November, 2007, [First Metropolitan] filed the [UFTA claim]. . . . The judgment against [John S.] was, however, set aside on December 17, 2007. Nevertheless, [First Metropolitan] resolved to execute and sign two notices of lis pendens [after the default judgment was set aside]. . .

In other words, the Benchicks argue that a fraudulent transfer claim by a creditor must be preceded by a judgment against the debtor, and because the judgment against John S. was lifted, First Metropolitan's UFTA claim, and the lis pendens arising therefrom, are unjustified. We disagree. First, again, the Benchicks provide not one authority to support their argument, and have therefore abandoned it.¹⁷ Second, the plain language of MCL 566.35(1) provides, in relevant part, that “transfer made or obligation incurred by a debtor is fraudulent as to a creditor

¹⁴ *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001) (Where plaintiff cited no law in support of his argument, it was abandoned because “[i]nsufficiently briefed issues are deemed abandoned on appeal”).

¹⁵ *Kauffman v Shefman*, 169 Mich App 829, 837; 426 NW2d 819 (1988).

¹⁶ Black's Law Dictionary (8th Ed.), p 950.

¹⁷ *Etefia*, 245 Mich App at 471.

whose *claim* arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred.”¹⁸ Accordingly, the plain language of the UFTA does not require a creditor such as First Metropolitan to have obtained a judgment against a debtor prior to filing suit under the UFTA.

Finally, we note that the Benchicks had statutory remedies of which they did not avail themselves. MCL 600.2711 provides:

Where a defendant sets up in his answer a counterclaim, upon which he demands an affirmative judgment affecting the title to, or the possession, use or enjoyment of real property, he may file for record a like notice at the time of filing his answer or at any time afterwards before final judgment. For these purposes, the defendant filing such a notice is regarded as a plaintiff and the plaintiff is regarded as a defendant.

In other words, the Benchicks were expressly authorized by statute to file a motion to bond off or cancel the *lis pendens* at the time it was filed. They declined to do so.

In short, the Benchicks have failed to demonstrate that the *lis pendens* First Metropolitan filed on 22003 Beck Road was unjustified. They have accordingly failed to establish the first essential element of slander of title.

B. MALICE

Having concluded that the *lis pendens* was valid, we note that whether the *lis pendens* was filed with malice is ultimately immaterial, as the Benchicks have already failed to establish that the *lis pendens* was unjustified, and accordingly did not establish one essential element of slander of title. However, even if the Benchicks had been able to show that the *lis pendens* was not justified, to sustain their slander of title claim, the Benchicks were also required to demonstrate that First Metropolitan filed the *lis pendens* with malice. The Benchicks have not provided any evidence that First Metropolitan acted with malice.

Even assuming, *arguendo*, that a *lis pendens* is invalid, “[m]alice 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.”¹⁹ Generally, in a slander of title action, the element of malice “cannot be maintained if the [party who files the *lis pendens* acted] in good faith upon probable cause” when filing the *lis pendens*.²⁰ Here, the Benchicks have failed to present evidence that the *lis pendens* was filed in bad faith or without probable cause. Accordingly, they have failed to demonstrate that it was filed with malice.

¹⁸ Emphasis added.

¹⁹ *Stanton v Dacheille*, 186 Mich App 247, 262; 463 NW2d 479 (1990).

²⁰ *Gliberman v Fine*, 248 Mich 8; 226 NW 669 (1929).

III. TORTUOUS INTERFERENCE

The trial court did not err in concluding that the Benchicks have failed to establish tortious interference with a contract. The elements of tortious interference of a contract are: “(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant.”²¹ “[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.”²²

Here, the Benchicks argue that there was a valid contract to purchase 22003 Beck Road for \$4.5 million, but because of First Metropolitan’s lis pendens, the deal was ruined, and the Benchicks lost the money they would have gained from the sale. However, the Benchicks’ tortious interference claim fails for the same reason their slander of title claim fails: they have failed to show that First Metropolitan’s lis pendens was unjustified, and they have failed to show that First Metropolitan filed the lis pendens with malice or an intent to interfere with a contract.²³

Affirmed. First Metropolitan, as the prevailing party, may tax costs pursuant to MCR 7.219(A).

/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan

²¹ *Badiee v Brighton Area Sch*, 265 Mich App 343, 366; 695 NW2d 521 (2005).

²² *Id.* (quotations omitted).

²³ *Id.*