

STATE OF MICHIGAN  
COURT OF APPEALS

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STULBERG ROCHESTER, L.L.C.,  
Plaintiff-Appellant,

UNPUBLISHED  
August 8, 2013

v

GULF ROCHESTER II, L.L.C.,  
Defendant-Appellee.

No. 307188  
Oakland Circuit Court  
LC No. 2011-116026-CK

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Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority's conclusion that plaintiff's claims arising out of defendant's receipt of mortgage-based funds in November, 2004 were governed by the six year statute of limitations and were not brought prior to the expiration of that period. However, plaintiff also claimed that defendant failed to adhere to its contractual duties when it allegedly received additional mortgage-based funds in 2007 and 2010. I dissent from the majority's decision to affirm the trial court's dismissal of those claims.

Defendant did not file an answer affirming or denying any allegations in the complaint. Instead defendant filed a one paragraph motion for summary disposition that contains nothing more than a prayer for relief, i.e. that the trial court dismiss plaintiff's complaint with prejudice. The motion did not reference the nature of plaintiff's claims nor offer any reasoning or grounds for the relief sought. This is contrary to MCR 2.116(D)(2) which provides that where a motion for summary disposition is based on 2.116(C)(7), the moving must set forth "the grounds" for the motion. It is true that defendant did provide its grounds in its brief in support of the motion. However, that brief contains absolutely no reference to plaintiff's allegations that defendant received monies in 2007 or 2010 that it was contractually obligated to share with plaintiff. Indeed, defendant's brief makes no reference whatsoever to the 2007 or 2010 events in either its statement of facts or its argument.

Similarly, when the parties argued the motion before the trial court on May 18, 2011, the defendant made no reference in its arguments to the allegations of the complaint dealing with the 2007 and 2010 events. The trial court took the motion under advisement. On July 6, 2011, the court issued an opinion granting the motion, but containing no reference to the alleged 2007 and 2010 receipts. On July 21, 2011, defendant filed a proposed judgment under the 7 day rule, dismissing the entire case with prejudice. Plaintiff objected to the proposed order and submitted

an alternative order providing for summary disposition as to the 2004 claim, but not as to any claims arising in 2007 and 2010.

On August 17, 2011, the trial court entered the order proposed by defendant. Plaintiff then filed a motion for reconsideration reviewing in detail the nature of the claims arising out of the 2007 and 2010 alleged receipts by defendant that it was contractually obligated to share with plaintiffs. Defendant responded with a brief arguing (a) that plaintiff had failed to defend the motion on this basis initially and (b) that the claims based on the 2007 and 2010 receipts had arisen in 2004 and so were properly dismissed on their merits.

The trial court issued an opinion and order on November 4, 2011 denying plaintiff's motion. It held that plaintiff should have been aware that the 2007 and 2010 alleged claims were challenged by defendant's motion and that:

[T]he breaches on which Plaintiff's claim is based are a 2004 mortgage, a 2007 advance on that mortgage, and a 2010 agreement between Defendant and its lender under which Defendant surrendered the property to the lender to resolve a default on the loan. Pursuant to the Court's previous ruling, however, Plaintiff cannot recover based on the mortgage itself; and is not entitled to any of the proceeds from that loan.

The contract, however, reads more broadly than the trial court's opinion suggests; it created duties that arose not merely upon entering into a mortgage, but also upon subsequent receipt of monies pursuant thereto. The contract provided that "[i]n the event all or any part of Parcel C is sold or in any way transferred, leased or hypothecated to anyone . . . by Purchaser at any time in the future Seller shall receive one-half of all amounts *received then and thereafter.*" (Emphasis added). Thus, the defendant's failures to pay 50% of the monies allegedly received "thereafter," i.e., in 2007 and 2010, constitute their own breaches under the language of the contract.

Because I believe that the defendant did not properly seek summary disposition as to its alleged 2007 and 2010 receipts I do not agree with the majority's conclusion that the fault in the issue not being heard lies solely with plaintiff. Further, I believe the trial court's legal analysis that these claims arose in 2004 is incorrect as they constitute separate breaches of contract. Accordingly, I would reverse the judgment and remand with directions for the trial court to enter partial summary disposition to defendant as to the claimed breach in 2004 and for further proceedings as to the plaintiff's allegations that defendant received monies in 2007 and 2010, 50% of which belonged to plaintiff pursuant to their 2004 contract.

/s/ Douglas B. Shapiro