

STATE OF MICHIGAN
COURT OF APPEALS

LARRY FLEMING and JOAN FLEMING,

Plaintiffs-Appellants,

v

CHARLES LEAP,

Defendant-Appellee.

UNPUBLISHED

September 17, 1996

No. 176454

LC No. 91-68094-AS

Before: McDonald, P.J., and Markman and C. W. Johnson,* JJ.

PER CURIAM.

Plaintiffs appeal by right an order dismissing their petition for superintending control. We affirm.

Plaintiffs were land contract vendees and defendant was land contract vendor of two properties: a Bailey Street property and an Isbell Street property. In January 1989, plaintiffs filed a complaint against defendant alleging waste and conversion in connection with fire insurance proceeds with respect to the Bailey property. In March 1989, they amended their complaint to add allegations that defendant interfered with their relationship with the tenant who occupied the Bailey property.

In March 1989, defendant initiated forfeiture proceedings relating to both the Bailey and Isbell properties. Plaintiffs moved to stay the forfeiture proceedings pending resolution of their tortious interference claim. The district court denied the motion to stay and proceeded to judgment on both forfeiture claims. Plaintiffs paid the amount owing under the Bailey judgment, which represented land contract amounts owing through April 19, 1989. Defendant regained possession of the Isbell property under a Writ of Restitution. Plaintiffs appealed the denial of their motion for stay of the forfeiture proceedings to circuit court. In January 1990, the circuit court vacated the denial of plaintiffs' motion.

Plaintiffs tortious interference claim was tried in February 1990. The jury returned a verdict in favor of plaintiffs in the amount of \$10,000. The trial judge reduced the amount to \$2524.44. Plaintiffs appealed to the circuit court. In an August 1991 opinion and order, the circuit court ruled that plaintiffs'

* Circuit judge, sitting on the Court of Appeals by assignment.

award of net loss profits was \$3425.03 and remanded the matter for rehearing solely on the issue of consequential damages.

Meanwhile, defendant reinstated forfeiture proceedings relating to the Bailey and Isbell properties.¹ Plaintiffs moved to consolidate, to grant restitution of benefits received, for sanctions and for dismissal of the forfeiture proceedings on the basis that they were barred by prior judgment. The district court granted the motion to consolidate in part and otherwise denied the motion. In November 1990, the district court entered an order relating to the Isbell property that declared that the land contract was in forfeiture and outlined specific redemption options. The order also provided that any amounts later determined to be owing to either party in connection with the property could be set off against the redemption amount to be paid by plaintiffs. Plaintiffs did not appeal this order.

In January 1991, the district court entered a judgment of forfeiture on the Bailey property. It awarded \$2642.37 to defendant, representing amounts owing through January 15, 1991. Again, plaintiffs did not appeal this judgment.

In January 1991, several days before the Bailey forfeiture judgment, plaintiffs filed the present petition for superintending control in circuit court. In this petition they sought to compel the district court to dismiss the forfeiture claims and to order restitution of amounts paid in satisfaction of the previous forfeiture judgments on the basis that they had been reversed. The circuit court stayed proceedings on the superintending control petition pending the jury trial of the consequential damages issue.

In June 1993, the court presiding over the tortious interference claim on remand entered a directed verdict in defendant's favor on the issue of consequential damages. On appeal, the circuit court affirmed. This Court granted plaintiffs leave to appeal the directed verdict.²

On June 1, 1994, the circuit court denied plaintiffs' motion to stay the superintending control proceedings pending the appeal of the consequential damages and dismissed the petition for superintending control. MCR 3.302 governs petitions for superintending control. MCR 3.302 states in pertinent part:

(A) Scope. A superintending control order enforces the superintending control power of a court over lower courts or tribunals.

(B) Policy Concerning Use. If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed. See subrule (D)(2), and MCR 7.101(A)(2), and 7.304(A).

(D) Jurisdiction.

(2) When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must be dismissed.

“Generally, for superintending control to lie, a plaintiff must establish the absence of an adequate legal remedy and that a defendant failed to perform a clear legal duty.” *Lockhart v Thirty-Sixth District Court Judge*, 204 Mich App 684, 688; 516 NW2d 76 (1994). The nature and extent of the legal duty is a question of law subject to de novo review. *Id.* This Court reviews the grant or denial of a petition for superintending control for an abuse of discretion. *In Re Goehring*, 184 Mich App 360, 366; 457 NW2d 375 (1990).

Here, at the time plaintiffs sought superintending control, appeal was available to them by three avenues. First, they were entitled to seek interlocutory appeal of the district court’s denial of their motion to dismiss the second set of forfeiture proceedings. MCR 2.116(J)(2)(a). Second, they were entitled to proceed to final judgment and raise errors relating to the district court’s denial of their motions to dismiss and for restitution in an appeal from the final judgment. MCR 4.202(L); MCR 2.116(J)(2)(c). Finally, they were entitled to petition the district court to stay the proceedings on the basis that their rights in the second set of forfeiture proceedings could not properly be resolved until the issues raised in the tortious interference action were settled. See *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 669-670; 341 NW2d 783 (1983). If the district court denied such a motion to stay, plaintiffs could have appealed the denial to circuit court as they successfully did in connection with the first set of forfeiture proceedings here.

The availability of means to appeal the district court’s denial of plaintiffs’ motions to dismiss and for restitution bars a superintending control action. MCR 3.302(B) and MCR 3.302(D)(2). Accordingly, the circuit court did not abuse its discretion in dismissing plaintiffs’ petition for superintending control. Our conclusion regarding this issue makes it unnecessary for us to reach the issue whether the district court failed to meet any clear legal duty.

Affirmed.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson

¹ The record does not contain copies of the subsequent complaints for forfeiture. However, they appear to relate to nonpayment of claims after April 19, 1989, the date of the original judgments.

² This Court affirmed the directed verdict in *Fleming v Leap*, unpublished opinion per curiam of the Court of Appeals, issued 12/15/95 (Docket No. 165631).