STATE OF MICHIGAN

COURT OF APPEALS

MBW INVESTORS, a Michigan co-partnership

Plaintiff-Appellee,

v

CIRCLES ASSOCIATES, a Michigan co-partnership, JAMES E. CORNELL,

Defendants-Appellants,

and

DALE C. CARR and SANDRA K. CARR,

Defendants-Appellees,

and

CITY OF NORTON SHORES ECONOMIC DEVELOPMENT CORPORATION and HACKLEY BANK & TRUST, N.A.,

Defendants.

UNPUBLISHED
October 18, 1996

No. 179859
LC No. 92-029118-CH

Before: Neff, P.J., and Sawyer and G. D. Lostracco,* JJ.

PER CURIAM.

Defendants Circles Associates, and Cornell claim an appeal of right from a September 19, 1994, judgment of foreclosure in plaintiff's favor. We affirm.

I

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

On December 30, 1985, defendant Circles Associates purchased the property in question from plaintiff on a land contract. In May 1991, Circles defaulted on the land contract by failing to make the required payments. On December 26, 1991, Circles assigned their interest in the land contract to defendants Dale C. Carr and Sandra K. Carr in lieu of foreclosure. The Carrs attempted to run the restaurant located on the property, but their efforts proved unsuccessful. As a result, the Carrs leased the restaurant to another party who intended to operate it as a night club until such time that he purchased the property. In January 1992, the Carrs made no further payments on the land contract. In June 1992, the lessee abandoned the property. On August 3, 1992, plaintiff filed the instant foreclosure action.

In October 1992, plaintiff's agent inspected the property and found it to be unsecured, without utility services, and missing its furniture. On plaintiff's orders, the agent secured the building, restored utility services, and purchased insurance on the premises. During this process, a locksmith under the agent's employ changed the locks to the building. Furthermore, a "for sale" sign from a realty firm owned by one of plaintiff's partners was substituted for one already on the premises. Additionally, plaintiff effected repairs to the building in the winter of 1992-1993 after a pipe to the building's fire suppression system burst after a furnace failure.

At the first portion of a bifurcated trial, defendants put forth a defense that the above actions amounted to self-help repossession of the premises by plaintiff. Defendants argued that this repossession constituted an election of remedies that nullified plaintiff's foreclosure action. After making extensive findings of fact in its opinion issued after the trial on this point, the trial court concluded that plaintiff partially possessed the property, but this possession did not equate to an election of remedies that would nullify plaintiff's foreclosure action.

At the valuation portion of the trial, defendants argued that the damage which occurred during plaintiff's possession of the building constituted waste, so they were entitled to a credit for this damage and a credit for the fair rental value of plaintiff's occupation. Furthermore, defendants asserted that plaintiff's foreclosure action was blocked by the clean hands doctrine. In its written opinion issued on this point, the trial court rejected defendants' arguments.

Subsequently, plaintiff purchased the building at the foreclosure sale for $500,000. After deducting the expenses of the sale and applying the resulting proceeds, the trial court determined that plaintiff was entitled to a deficiency judgment of $429,617 against defendants.

II

Defendants argue that the trial court erred when it concluded that plaintiff's occupation of the building did not constitute an election of remedies that barred plaintiff's foreclosure action. We disagree. Foreclosure actions are equitable in nature. MCL 600.3180; MSA 27A.3180. This Court reviews de novo the trial court's decision to grant or deny equitable relief. *Olsen v Porter*, 213 Mich App 25, 28; 539 NW2d 523 (1995). Nevertheless, this Court reviews the findings of fact supporting this decision for clear error. *Mitchell v Dahlberg*, 215 Mich App 718, 727; 547 NW2d 74 (1996).

Defendants assert that the trial court clearly erred when it did not find that the various facts constituted an intent to repossess the property in question. We disagree. In order to balance the two standards of review in equity cases, we must first evaluate the trial court's findings of fact for clear error. Defendants' challenge to the trial court's findings is merely one that the trial court should have adopted another inference that could have been drawn from the evidence introduced at trial. The mere presence of an opposite inference does not render the trial court's findings clearly erroneous. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 247; 533 NW2d 15 (1995). Under the clear error standard of review, a finding of fact is clearly erroneous only when there is no evidence to support it or when this Court, after reviewing the entire record, is left with a definite and firm conviction that a mistake has been made. *Id*. at 246. After reviewing the trial court's findings of fact using the correct standard, we find that these findings were not clearly erroneous. As a result, we must now determine whether the trial court's dispositive ruling was fair and equitable in light of these findings. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

As a general rule, a vendor "may not take possession of property and attempt to sell it and, if unable to do so, seek then to foreclose." *Gruskin v Fisher*, 405 Mich 51, 69; 273 NW2d 893 (1979). The rationale behind this rule is the election of remedies doctrine. This doctrine provides that one is precluded from pursuing two inconsistent remedies that are available to him. *Riverview Co-op, Inc v First Nat'l Bank & Trust Co*, 417 Mich 307, 311-312; 443 NW2d 451 (1983). Thus, this doctrine prevents a party from being awarded a double recovery. *Id.*. In land contract jurisprudence, an election of remedies may occur when the vendor is able to peacefully recover the possession of the land when the land is vacant. *Rothenberg v Follman*, 19 Mich App 383, 388; 172 NW2d 845 (1969).

Our review of the record convinces us that plaintiff's actions were not an election of a remedy via a self-help repossession. Foremost, plaintiff never sent a notice of forfeiture to defendants or the Carrs. Without this notice, no forfeiture via a self-help repossession can be found. *Rothenberg*, *supra* at 388. Furthermore, we find that the mere fact that plaintiff placed a "for sale" sign on the property does not equate to the required notice because such preliminary actions do not irrevocably bind a party to any course of action. *Gruskin*, *supra* at 70. Even if a sale had occurred, plaintiff would not have obtained a double recovery because the record clearly shows that plaintiff intended to involve defendants in such an endeavor. Because no self-help repossession can be found in the situation at hand, we find that the trial court's dispositional ruling was fair and equitable.

III

Defendants next argue that the trial court erred by refusing to give them a credit against any deficiency judgment for waste committed by plaintiff because plaintiff was the equivalent of a mortgagee in possession who should be liable for these damages. As a general rule, a mortgagee in possession "must preserve the estate in as good condition as that in which he received it." *Barnard v Paterson*, 137 Mich 633, 634; 100 NW 893 (1904). Thus, the mortgagee in possession is liable "for loss occasioned by his wilful default or gross neglect in this respect." *Fidelity Trust Co v Saginaw Hotels Co*, 259 Mich 254, 259; 242 NW 906 (1932).

Under the circumstances of the case at hand, we disagree that such liability could attach to plaintiff. Our review of the record shows that plaintiff's agent found the building unsecured and damaged when he entered it in October 1992. Additionally, the evidence introduced at trial shows that plaintiff improved the situation by securing the building and restoring the utilities for the premises so the fire protection system would function. We do note that the building was damaged when a pipe burst after a furnace failure, but this does not rise to the level of wilful default or gross neglect. We agree with the trial court that defendants walked away from their responsibilities after assigning their interest in the building to the Carrs "without hardly looking back to see who was there." Consequently, we find no error on this ground.

In the alternative, defendants argue that the trial court erred when it denied their request for rent while plaintiff occupied the building. It is true that a mortgagee in possession has a duty to pay rent to its mortgagor. *Byers v Byers*, 65 Mich 598, 601; 32 NW 831 (1887). However, the key to this duty is the dispossession of the mortgagor from the property because the duty is based upon the mortgagee's use and occupation of the premises. 55 Am Jur 2d, Mortgages, § 229, p 337. Because we found that plaintiff did not dispossess defendants, defendants have no right to such remuneration. Consequently, no error can be found on this ground either.

IV

Defendants argue last that the trial court erred when it failed to block plaintiff's recovery of a deficiency judgment under the clean hands doctrine. Even though the trial court did not determine whether such an action was proper in the situation before it, we will review the matter because defendants did raise it below. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). Nevertheless, we disagree with defendants' argument.

Foreclosure actions are equitable in nature. MCL 600.3180; MSA 27A.3180. As a result, a person seeking equity can be barred from receiving equitable relief under the clean hands doctrine. This doctrine bars a person's recovery "if there is any indication of overreaching or unfairness on this person's part." *Royce v Duthler*, 209 Mich App 682, 688-689; 531 NW2d 817 (1995). The conduct in question need not be actionable in any way; it must only consist of "a wilful act that transgresses the equitable standards of conduct." *Id*. at 689. Defendants failed to provide us with any facts to support a conclusion that plaintiff acted with unclean hands other than to reiterate their arguments that we have already decided against them. Correspondingly, the trial court properly failed to grant relief to defendants pursuant to their unsupported claim.

Affirmed.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ Gerald D. Lostracco