STATE OF MICHIGAN

COURT OF APPEALS

GREGORY I. DONOVAN,

Plaintiff-Appellant,

v

ROBERT V. DECORTE, JUDITH A. DECORTE, JOHN J. OCHMAN, VIRGINIA OCHMAN, RUDOLPH A. SCHLAIS, JR., BARBARA SCHLAIS, MICHAEL V. TIERNEY, SALLY J. TIERNEY, LEON F. VERCRUYSSE, MADELINE VERCRUYSSE, LAWRENCE M. WEGRZYN, NANCY D. WEGRZYN, RONALD ZIEMBA, ROSEMARY ZIEMBA, RICHARD BEAUBIEN, RALPH GREEN, LYLE NUSTAD, PROSPECT FARMS LIMITED PARTNERSHIP, and GREGG TWO LIMITED PARTNERSHIP,

Defendants-Appellees.

UNPUBLISHED
August 12, 1997

No. 187399
Wayne Circuit Court
LC No. 93-301251-CB

Before: Young, P.J., and Gribbs and Latreille,* JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition in favor of defendants. Plaintiff also challenges the circuit court's orders denying his motions to compel discovery and to disqualify defendant's legal counsel. We reverse in part, affirm in part, and remand.

In October of 1986 plaintiff and most of the individual defendants formed the Gregg Two Associates Limited Partnership (Gregg Two). Plaintiff was the sole original general partner for Gregg Two; the DeCortes, Ochmans, Vercruysses, Wegrzyns, and Ziembas were the original limited partners in Gregg Two. The Gregg Two limited partnership was formed for the purpose of purchasing and reselling a 296-acre parcel of land located in Superior Township, Washtenaw County. Under the partnership agreement plaintiff, as general partner, received a contingent investment interest which

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

entitled him to 20% of the partnership's income beyond return to partners of cash invested to $250,000, and 50% of such partnership income in excess of $250,000.

The Gregg Two partnership paid $2,700 per acre for its original 296-acre parcel. The partnership sold 82 acres of the parcel at $5,000 per acre in 1987, and an additional 56 acres at $8,000 per acre in 1990. The combined sales of the 82-acre and 56-acre parcels exceeded the original price paid for the entire 296 acres and left Gregg Two with 156 acres left for sale.

In May 1991 developer Ronald Cook offered to buy 81 acres of the remaining 156-acre parcel at $5,600 per acre. The Gregg Two partners rejected this offer. Shortly afterward, a majority of the Gregg Two limited partners voted to remove plaintiff as manager of Gregg Two and to replace him with defendant Robert DeCorte. It is not clear whether the removal of plaintiff's managerial duties also changed his partnership status from a general to a limited partner. Both parties made inconsistent statements regarding plaintiff's status, although in this appeal plaintiff maintains that he remains a general partner and defendants assert that he is now a limited partner. In any event, the partnership agreement provides that plaintiff retains his contingent investment interest, which interest entitled him to 20% of the profits up to $250,000 and 50% of the profit over that amount.

Plaintiff has presented evidence showing that, after DeCorte's takeover of Gregg Two's management, defendants effectively removed the property from the market and made no efforts to sell it. Ronald Cook remained interested in buying all or part of the property, and presented an affidavit that he would have paid up to $7500 per acre for the land, but that his efforts to negotiate a sale were rebuffed, and the Gregg Two partnership showed no interest in selling the property. Rather than negotiating the sale of the remaining 156 acres to third parties, DeCorte and the other original limited partners, excluding plaintiff, decided to form a second limited partnership, defendant Prospect Farms Limited Partnership ("Prospect Farms"), to purchase the Gregg Two land. Defendants Nustad, Green, and Beaubien were also made partners in Prospect Farms. DeCorte paid the expenses incurred in setting up Prospect Farms out of Gregg Two funds. Plaintiff was not invited to invest in Prospect Farms and was not informed of its creation or the use of Gregg Two assets. Of note, DeCorte also had Gregg Two's accountant, John Daratony, prepare various scenarios showing the amount of profits which the various Gregg Two partners would receive if the land was sold at $4,000, $5,000, or $6,000 per acre. At $4,000 per acre the Gregg Two profits would not exceed $250,000 and plaintiff would not receive any second-tier profit from his contingent investment interest.

Prospect Farms formally came into existence in December 1992, and immediately offered to buy all of the remaining Gregg Two land at $4,000 per acre. All of the Gregg Two partners but plaintiff had agreed in advance to this sale. Suspicious of his partners' acceptance of this low price, plaintiff investigated Prospect Farms and discovered the identities of its partners. Prior to the meeting formalizing the Prospect Farms sale, plaintiff filed his original complaint and sought a preliminary injunction to bar the sale. Plaintiff sought an injunction on the basis that the Prospect Farms sale was designed to transfer the Gregg Two land at a greatly reduced price in order to deprive plaintiff of the full, fair value of his contingent investment interest. The circuit court granted a preliminary injunction barring the sale, and the parties later stipulated to entry of a permanent injunction barring sale of the Gregg Two property without the consent of all the parties. Plaintiff ultimately filed an amended

complaint which alleged counts of breach of fiduciary duty, fraud and misrepresentation, conspiracy (to commit fraud), breach of contract, and (tortious) interference with contractual relations and business relations. Plaintiff's amended complaint also sought injunctive relief, declaratory judgment that plaintiff remained a general partner in Gregg Two, dissolution of the Gregg Two limited partnership, and exemplary damages.

Defendants moved for summary disposition of plaintiff's complaint pursuant to MCR 2.116(C)(10), arguing that because the Prospect Farms sale never went through there was no genuine issue of fact that plaintiff had suffered no actual damages. Following several hearings the circuit judge finally agreed with defendants that plaintiff had received all the relief to which he was entitled and granted defendant's motion.

I.

Plaintiff argues that the circuit judge erred by dismissing his claims on the basis that he had suffered no actual money damages from defendants' actions. We agree, and reverse the trial judge's order dismissing plaintiff's first amended complaint.

Plaintiff presented sufficient evidence regarding the fair market value of the remaining Gregg Two land and the probability of its sale during the relevant time period to create a genuine issue of material fact regarding whether he sustained actual money damages due to defendants' actions. Plaintiff's lost profits were ascertainable to a reasonable degree of certainty and not solely based upon conjecture and speculation. *Bonnelli v Volkswagen of America, Inc*, 166 Mich App 483, 511-513; 421 NW2d 213 (1988). Additionally, the evidence showed that defendants improperly converted Gregg Two funds by using them to pay the expenses incurred in creating the Prospect Farms limited partnership. These additional, wrongfully-incurred expenses will ultimately affect Gregg Two's profitability and the value of plaintiff's contingent investment interest. Plaintiff may recover damages arising from defendant's wrongful use of Gregg Two's assets. *Oakland National Bank v Anderson*, 81 Mich App 432, 438; 265 NW2d 362 (1978).

Moreover, even if plaintiff could not show any actual money damages, the trial judge erred in dismissing those counts of his complaint which sought declaratory judgment and the dissolution of the Gregg Two limited partnership, since neither of these counts required that plaintiff have suffered money damages in order to obtain the relief requested.

Plaintiff also argues that he is entitled to exemplary damages and attorney fees. These issues were never decided by the trial court. It would be premature to consider them on appeal.

II.

Plaintiff argues that the defendants who were partners in Gregg Two breached their fiduciary duties to that partnership and to him, and that the trial judge erred by summarily dismissing his count requesting dissolution of the limited partnership. We agree.

The fiduciary relationship between partners "impose[s] on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs." *Band v Livonia Assocs*, 176 Mich App 95, 113; 439 NW2d 95 (1989). Plaintiff presented evidence which strongly indicated that his fellow partners at Gregg Two breached their fiduciary duty to him by secretly arranging to sell the Gregg Two property to themselves at an alleged below-market price that would greatly diminish the amount he would receive from the sale. Plaintiff's evidence showed that defendants engaged in a course of conduct which was "illegal, fraudulent, or willfully unfair and oppressive" to his interest as a Gregg Two partner. Under the facts presented by plaintiff, dissolution of the limited partnership may be the only appropriate form of relief. MCL 449.1802; MSA 20.1802; *Band*, 176 Mich App 114-115.

We note that whether plaintiff is entitled to seek dissolution before the circuit court may depend upon whether he is a general or limited partner. When before the circuit court, defendants argued that plaintiff could not seek dissolution because the Gregg Two partnership agreement required that limited partners submit claims for dissolution to arbitration. The circuit judge never reached a decision on plaintiff's request for declaratory judgment. Since plaintiff's status as a limited or general partner appears relevant to this question and other issues, we direct the circuit judge on remand to reach a decision on the merits regarding plaintiff's count for declaratory judgment.

III.

Plaintiff argues that the circuit judge erroneously granted summary disposition of his claim for tortious interference with contractual or business relations. We agree.

Plaintiff presented evidence showing that a valid business relationship or expectancy existed between himself and the Gregg Two limited partnership, namely that the land would be sold at a price designed to maximize the partnership's profit and that he would receive a portion of that profit according to his contingent investment interest. This relationship or expectancy was based upon the Gregg Two Limited Partnership Agreement. The defendants, who were partners in Gregg Two, knew of plaintiff's contract-based business relationship or expectancy with the limited partnership. Plaintiff presented evidence showing that defendants, as partners or prospective partners of Prospect Farms, wrongfully and intentionally interfered with this relationship or expectancy by taking the Gregg Two land off the market and attempting to sell it to themselves at a price designed to minimize plaintiff's returns under his contingent investment interest. Plaintiff also presented evidence showing that he suffered actual, pecuniary damages from defendant's actions. The evidence presented by plaintiff showed all the essential elements of tortious interference with contract or tortious interference with business relations. *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996); *Winiemko v Perry*, 203 Mich App 411, 416; 513 NW2d 181 (1994).

IV.

Plaintiff argues that the trial judge erred by denying his motion to compel discovery of legal and financial records regarding the Gregg Two limited partnership. We agree.

Plaintiff initially sought to obtain any and all documents, files, and correspondence relating to the Gregg Two and Prospect Farms limited partnerships. However, at the hearing on his motion to compel discovery, plaintiff's counsel argued that he was entitled to full disclosure of the legal and accounting bills paid by Gregg Two. The circuit judge denied this request on the basis that the information sought was protected by attorney-client and accountant-client privilege.

The circuit judge erred by denying plaintiff's request for discovery without first determining whether he was a general or limited partner of Gregg Two. If plaintiff remains a general partner, then he is entitled to full disclosure of the legal and accounting services rendered on behalf of or paid for by Gregg Two. MCL 449.20; MSA 20.20, MCL 449.1403; MSA 20.1403. If plaintiff is a limited partner, he is still entitled to "true and full information regarding the state of the business and financial condition of the limited partnership, … and … other information regarding the affairs of the limited partnership as is just and reasonable." MCL 449.1305(2); MSA 20.1305(2). Moreover, the nature and cost of legal and accounting services charged to the Gregg Two partnership leading up to the Prospect Farms offer, including the charges incurred by Gregg Two arising from the creation of Prospect Farms, should be available for discovery. This information is directly relevant to the subject matter of plaintiff's claims and the issue of his damages. Plaintiff presented ample evidence indicating that these legal and accounting services were incurred as part of defendant's scheme to wrongfully and fraudulently deprive plaintiff of the full and fair value of his contingent interest. Defendants may not assert privilege for the purpose of protecting communications made for the purpose of perpetrating a fraud. *Fassihi v Sommers, Schwartz, Silver & Schwartz*, 107 Mich App 509, 519; 309 NW2d 645 (1981).

V.

Plaintiff argues that the circuit judge erred by denying his motion to disqualify defense counsel. Plaintiff asserts that defense counsel should be disqualified due to a conflict of interest and because they are likely to be called as witnesses at trial. We disagree.

Plaintiff has not shown that an attorney-client relationship existed between defendants' legal counsel and plaintiff. The fact that defense counsel represents the Gregg Two limited partnership does not give rise to an attorney-client relationship between counsel and plaintiff since the partnership is a separate entity for purposes of litigation. *Yenglin v Mazur*, 121 Mich App 218, 224; 328 NW2d 624 (1982). Nor has plaintiff shown that defense counsel should be called as witnesses; the relevant evidence may be obtained without requiring their testimony. *Kubiak v Hurr*, 143 Mich App 465, 471; 372 NW2d 341 (1985).

The circuit court's order denying plaintiff's motion to disqualify defense counsel is affirmed. The circuit court's orders dismissing plaintiff's first amended complaint and denying plaintiff's motion to compel discovery are hereby reversed and the case remanded to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.
/s/ Roman S, Gribbs
/s/ Stanley J. Latreille