STATE OF MICHIGAN

COURT OF APPEALS

LEUWANIA BYGRAVE,

Plaintiff-Appellant/Cross-Appellee,

v

STANLEY R. VAN REKEN and HARRIET E. VAN REKEN,

Defendants-Appellees/Cross-Appellants,

and

BANNER REALTY & INVESTMENT and JOHN E. MCCAUSLIN,

Defendants-Appellees.

UNPUBLISHED
April 21, 1998

No. 196949
Oakland Circuit Court
LC No. 95-494181 CK

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the Oakland Circuit Court's July 19, 1996 order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).[1] Defendants Stanley and Harriet Van Reken cross-appeal the court's September 27, 1995 order denying in part their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10).[2] We reverse and remand for further proceedings consistent with this opinion.

On May 15, 1990, plaintiff acquired a purchaser's interest in a land contract in the amount of $43,312.21; plaintiff paid $8,542.00 to Letitia Horton for the assignment of the latter's interest. When plaintiff failed to pay the installments for November and December, 1990, and failed to pay taxes or insurance, the vendors commenced an action against her in district court. On January 31, 1991, the court entered a forfeiture judgment against plaintiff in the amount of $3,876.06 for delinquent real estate taxes and land contract payments.

Under the law, plaintiff had a ninety day redemption period in which to pay the balance owing on the forfeiture judgment. On April 30, 1991, plaintiff contacted defendant Stanley Van Reken, a licensed real estate broker and friend/acquaintance of plaintiff, for assistance in redeeming the property and in reinstating her purchaser's interest in the land contract. Plaintiff met with Mr. Van Reken and his attorney, defendant John McCauslin. According to plaintiff, Van Reken told her that he could not loan her the money unless she signed certain "blank" papers as security for the loan. According to Van Reken, plaintiff agreed that he would take over her interest in the forfeited contract, tender redemption of the balance due, challenge the writ, and then rent the property to plaintiff on favorable terms. The parties executed an assignment of plaintiff's purchaser's interest in the land contract, a quit claim deed (conveying the property to the Van Rekens for the consideration of one dollar), and a rental agreement. According to plaintiff, she did not read the papers and was not given a copy of the signed documents. Redemption funds were tendered to the district court on that same day. Thereafter, on May 13, 1991, plaintiff, represented by defendant McCauslin, appeared before the district court. The court vacated the writ of restitution, determining that the redemption had been properly made.

On June 10, 1991, the Van Rekens, represented by McCauslin, initiated a non-payment of rent action against plaintiff. This was to be the first of thirteen such rent actions, resulting in eight consent judgments, two default judgments and one judgment after a hearing, one dismissal, and one action that was still pending at the time plaintiff claimed an appeal. Plaintiff maintains that throughout these proceedings, she repeatedly appeared in the district court and that she continuously asserted that she was a land contract purchaser rather than a tenant. Plaintiff also argues that she tried to assert ownership of the property, but that the district court told her, on several occasions, that she would have to go to circuit court to litigate such issues.

The first hearing at which plaintiff appeared took place on December 31, 1991. At this time, plaintiff contested the amount due, but agreed to pay all rents that were due. On February 24, 1992, plaintiff filed a motion to set aside the judgment, arguing that the Van Rekens had no legal title to the property and that the rental agreement was void. At the hearing on plaintiff's motion, the trial court told plaintiff that she should have raised these defenses at the December 31, 1991 hearing. The court also told plaintiff that she could litigate the issues if she paid $ 2,569.00 by March 3, 1992. Thereafter, at a hearing on May 18, 1992, defendants agreed to withdraw their writ of restitution in exchange for the payment of the outstanding rental balance.

Subsequently, almost three years later, plaintiff filed an answer to a complaint for nonpayment of rent, again asserting that she was a land contract purchaser rather than a tenant. At a hearing on March 15, 1995, the trial court informed plaintiff's attorney that he should institute "an action in Circuit Court for declaratory judgment of some kind" because the dispute was not just a "simple landlord and tenant matter" but required a determination of the interests of the parties. The court stated that it would set the matter of trial, or allow plaintiff the opportunity to file an action within ten days in the circuit court. Plaintiff chose the latter option, and on March 24, 1995, an action was filed in Oakland Circuit Court.

In her first amended complaint filed on April 13, 1995, plaintiff sought equitable relief in the form of an order declaring the quit claim deed to be an equitable mortgage. Plaintiff argued that she should be restored to her former status as a land contract purchaser because the amount that Mr. Van Reken advanced to her to redeem the initial land contract forfeiture was a loan. Plaintiff also sought

compensatory damages in the amount of $150,000 arising from defendants' alleged real estate fraud and $1,000,000 in exemplary damages arising from defendants' abuse of process in initiating the nonpayment of rent actions. In their answer and counterclaim, defendants asserted the affirmative defenses of res judicata, collateral estoppel and laches. Defendants filed separate motions for summary disposition pursuant to MCR 2.116(C)(8) and (10). On June 28, 1995, defendants filed a motion for partial summary disposition pursuant to MCR 2.116(C)(8) and (10), asserting that plaintiff could not establish one of the elements for the imposition of an equitable mortgage (inadequate consideration). In an order entered on September 27, 1995, the court granted in part and denied in part defendants' motion.

Defendants then filed a motion for summary disposition pursuant to MCR 2.116(C)(7) alleging that plaintiffs' claims were barred by res judicata or collateral estoppel because she failed to preserve the issues in the twelve prior proceedings in district court. According to defendants, plaintiff's claims of fraud arising from the April 30, 1991 transaction should have been raised by way of an affirmative defense in the district court summary proceedings. Following motion hearings on February 21 and July 10, 1996, the court granted defendants' motion for summary disposition and dismissed plaintiff's first amended complaint on the ground that plaintiff's failure to pursue the issues in the prior summary proceedings barred her claims under *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995).

I

Plaintiff first argues that the circuit court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7). We review a trial court's decision to grant a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law. *Huron Tool and Engineering Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-377; 532 NW2d 541 (1995).

In granting defendant's motion for summary disposition, the court relied upon *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995). In *Sprague*, this Court found that the plaintiff's claim seeking rescission of a land contract on the basis of fraud and misrepresentation was barred pursuant to the doctrine of res judicata. *Id.* at 313. The plaintiff in *Sprague* had stopped her monthly land contract payments after learning that two of her six rental units had been condemned by the City of Port Huron. *Id.* at 312. When the defendant filed an action for summary possession in the district court and the plaintiff did not respond, the court forfeited the land contract and entered a writ of restitution. *Id.* The plaintiff then filed an action in circuit court seeking to rescind the land contract. *Id.* This Court held that the plaintiff's claims should have been raised as a counterclaim to the summary possession proceedings, and that since plaintiff had failed to do so, her claims were barred under this state's broad rule of res judicata. *Id.* at 313.

At first glance, the trial court's reliance upon *Sprague* appears proper. As this Court noted in *Sprague*, res judicata bars not only claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties, "exercising reasonable diligence," could have raised but did not. *Id.* at 313 (quoting *Courtney v Feldstein*, 147 Mich App 70, 75; 382 NW2d 734 ([1985]). Since plaintiff's claims arise from the April 30, 1991 transaction, they could have been raised in the

subsequent district court proceedings. As the district court observed, plaintiff never raised these issues during the summary proceedings on December 31, 1991, when she stipulated that a writ of restitution would issue on January 23, 1992, if $2,569.00 were not paid. Alternatively, plaintiff could have appealed the district court's decisions. Nevertheless, given the fact that the district court led plaintiff to believe that her claim of equitable mortgage could only be raised in circuit court, we believe that summary disposition was improper.[3]

Res judicata should not apply where, as plaintiff alleges, the district court did not adjudicate any of plaintiff's legal or equitable claims. Plaintiff raised these claims in the district court by way of her February 24, 1992 motion to set aside judgment, her March 8, 1995 answer to defendants' complaint for nonpayment of rent, and her repeated attempts throughout the summary proceedings to verbally assert her status as a land contract purchaser. At the February 24 hearing, the court told plaintiff that she could litigate her claim, but only if she could come up with $2,569.00 in rent by March 3, 1992. The court also informed plaintiff that she could raise "any other issues," including a claim for equitable mortgage, in circuit court, and that "[s]he could be in circuit court in five minutes and raise the issue. So the issues are not foreclosed." Similarly, at the March 15, 1995 hearing on plaintiff's answer to defendants' complaint for nonpayment of rent, the district court told plaintiff that she should take her case to circuit court because it was not just a "simple landlord and tenant matter" but required a determination of the interests of the parties. The court allowed plaintiff to file in circuit court rather than proceed to trial on her claim in the district court.

Contrary to the dissenting opinion in this case, the district court did not "refuse" to hear plaintiff's affirmative defenses. Rather, as discussed above, the court gave plaintiff the choice of having her case proceed to trial in the district court or the circuit court. When given this choice, plaintiff exercised her right to take her claim to circuit court. Thus, we perceive no specific decision of the district court that plaintiff might have appealed.

Despite plaintiff's efforts to assert her status as a land contract purchaser, the district court never decided the merits of plaintiff's complaint. Plaintiff relied on the district court's insistence that plaintiff's claim belonged in circuit court. Since plaintiff's decision to file in circuit court rather than proceed to trial in district court was based on this reliance, we believe that application of res judicata would deny plaintiff due process of law. As this Court noted in *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995), due process in civil cases generally requires "notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. . . . The opportunity to be heard does not require a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence." *Id.* In the present case, plaintiff's claim should not be barred because the district court effectively denied plaintiff the opportunity to present her claim in that forum. Plaintiff raised the issues related to her claim on several occasions and was told that she could litigate her claim later and that she could take her claim to circuit court. To apply res judicata under these circumstances would effectively deny plaintiff her opportunity to be heard.

Since we conclude that the circuit court erred in granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7), we remand for further proceedings consistent with this opinion.

II

Plaintiff's next argument on appeal is that the circuit court erred in granting and issuing a written order to disburse escrow to defendants in violation of the 21-day automatic stay rule. We review decisions relating to the automatic stay rule, MCR 2.614(A)(1), for an abuse of discretion. *Gerbig v White Motor Credit Corp,* 165 Mich App 372, 375; 418 NW2d 468 (1987). Given the circumstances, we find no such abuse.

Subsequent to the dismissal of plaintiff's complaint, defendants moved for disbursement of the rent escrow; the court granted defendants' motion in an order entered on August 7, 1996. On August 9, 1996, plaintiff, acting in propria persona, filed a motion for stay of proceedings, waiver of bond, and request for reinstatement of the escrow order. On August 12, 1996, plaintiff filed the instant claim of appeal with this Court. On August 21, 1996, the circuit court denied plaintiff's motion for immediate stay and found that "all other motions are improper due to pendency of appeal." Nevertheless, on August 23, 1996, plaintiff filed a new pleading requesting an order to show cause and a show cause hearing regarding the return of the escrow funds. The court denied plaintiff's motion and imposed sanctions against plaintiff. Plaintiff now argues that the court violated that automatic stay rule in disbursing the escrow funds. We disagree.

MCR 2.614(A)(1) provides:

> Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for a new trial, a motion to alter or amend the judgment, a motion for judgment not withstanding the verdict, or a motion to amend or for additional findings of the court is filed and served within 21 days after entry of the judgment, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order on the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

Under the present circumstances, this rule did not operate to prevent the trial court from entering an order releasing the rent escrow. As defendants point out, the order was effectively a consent order because the parties agreed to it. Thus, it is governed by the principles set forth in *Walker v Walker,* 155 Mich App 405, 406-407; 399 NW2d 541 (1986):

> When a party approves an order or consents to a judgment by stipulation, the resultant judgment or order is binding upon the parties and the court. . . Absent fraud, mistake or unconscionable advantage, a consent judgment cannot be set aside or modified without the consent of the parties . . . nor is it subject to appeal. (Citations omitted).

Since disbursement of the funds was made pursuant to a court order after a hearing at which plaintiff's counsel did not object to disbursal, we find no abuse of discretion and decline to reverse.

III

Plaintiff's final argument is that the court erred in imposing attorney fee sanctions as "costs" against her for challenging the release of escrow funds. The court imposed such sanctions when, after telling plaintiff that her August 14, 1996 motion for rehearing and other related motions were improper because plaintiff had already filed an appeal to this Court, plaintiff nonetheless filed a new pleading requesting an order to show cause and show cause hearing regarding the immediate return of the escrow funds. The court denied plaintiff's request and imposed sanctions against plaintiff in the amount of $150 in favor of each of the three defense attorneys who appeared in response to the notice. Plaintiff claims that the court's actions were in violation of MCR 7.209(A)(2). We disagree.

Pursuant to MCR 7.208, a trial court may not set aside or vacate an appealed order or judgment (barring an exception, none of which applies to this case).[4] Since plaintiff had already appealed the escrow release order to this Court, the trial court no longer had jurisdiction to hear the matter. See *Admiral Ins Co v Columbia Cas Ins Co,* 194 Mich App 300, 314; 486 NW2d 351 (1992). Therefore, the court's determination that plaintiff's pleading was frivolous, and that there was no basis for filing another motion for reconsideration, is supported by the evidence.

IV

The final issue for our resolution concerns a cross-appeal by the Van Rekens. Defendants claim that the trial court erred in not dismissing plaintiff's equitable mortgage claim pursuant to MCR 2.116(C)(8) and/or (10) because the consideration paid by the Van Rekens was adequate.

A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett,* 442 Mich 368, 374; 501 NW2d 155 (1993). A trial court must consider the pleadings, affidavits, depositions, admissions and other available documentary evidence. *Id.* Giving the benefit of reasonable doubt to the nonmovant, the court msut determine whether a record might be developed which will leave open an issue upon which reasonable minds could differ. *Bertrand v Alan Ford, Inc,* 449 Mich 606, 617-618; 537 NW2d 185 (1995). On appeal, we review the trial court's findings de novo. *Pinckney Community Schools v Continental Casualty Co,* 213 Mich App 521, 525; 540 NW2d 748 (1995).

Summary disposition may be granted to a party under MCR 2.116(C)(8) when the opposing party has failed to state a claim upon which relief can be granted. A motion for summary disposition for failure to state a claim tests the legal sufficiency of the claim and should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possible justify recovery. *ABB Paint Finishing, Inc, v Nat'l Union Fire Ins Co,* 223 Mich App 559, 561; 567 NW2d 456 (1997). The court should liberally permit the parties to amend their pleadings unless the amendment would not be justified. *Id.*

In the present case, plaintiff claims that she received a loan from Mr. Van Reken; she denies knowledge of the quit claim deed or rental agreement. Consequently, plaintiff argues that the conveyance should be treated as an equitable mortgage because the real estate conveyed was in fact intended to serve as security for plaintiff's obligation to repay the loan. See *Schultz v Schultz,* 117 Mich App 454, 457-459; 324 NW2d 48 (1982). Defendants argue, however, that an equitable mortgage may not be declared because the consideration exchanged for the property was adequate.

We are unable to determine from the record the basis for the trial court's decision on this issue. It appears that the court denied defendants' motion pursuant to MCR 2.116(C)(8) or (10), yet the reasons for the court's decision are not in the record. Furthermore, it appears to this Court that discovery on this matter was not yet complete (e.g., plaintiff claims that Mr. Van Reken never submitted to a deposition as mandated by the trial court's February 21, 1996 order). Finally, we note that defendants' claim relates primarily to Count I of plaintiff's amended complaint (the claim for an equitable mortgage). Thus, even if we were to agree with defendants that Count I should have been dismissed, plaintiff has a number of other claims that must still be resolved on remand.[5]

Given these facts, we feel that this claim needs further factual development and that such development should take place under the guidance of the trial court. Accordingly, on remand, the trial court is instructed to permit any necessary discovery, to find the facts necessary for resolution of the equitable mortgage issue, and to determine whether summary disposition is appropriate in light of these facts.[6] If the trial court determines that summary disposition is appropriate, it should then decide whether the remainder of plaintiff's claims may be heard independently or whether plaintiff's claims are dependent upon the finding of an equitable mortgage.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski

[1] MCR 2.116(C)(7) provides that a summary judgment motion may be premised on the fact that:

> The claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

[2] According to defendants, Banner Real Estate is a d/b/a which the Van Rekens abandoned five or ten years before meeting plaintiff.

[3] It is important to note that the facts in this case are extremely unique; our determination rests heavily on the trial court's statements and the nature of the proceedings at issue.

[4] MCR 7.208(A) provides:

> After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except by order of the Court of Appeals, by stipulation of the parties, or as otherwise provided by law. . .

[5] Count II is an action for specific performance. Count III asserts an abuse of legal process. Count IV alleges intentional infliction of emotional distress. Count V is a claim for conversion, and Count VI is an action for fraud, deceit, and misrepresentation.

[6] In this respect, we note that the facts in this case are extremely similar to those in *Koenig v Van Reken*, 89 Mich App 102; 279 NW2d 590 (1979), and *Grant v Van Reken*, 71 Mich App 121; 246 NW2d 348 (1976). In both cases, this Court concluded that the evidence supported an equitable mortgage declaration. However, given the paucity of factual development in the record for this case, we decline to decide this issue.