STATE OF MICHIGAN

COURT OF APPEALS

MARKET DEVELOPMENT CORPORATION and HARDING'S GALESBURG MARKET, INC.,

Plaintiffs-Appellees,

v

VILLAGE GREEN PROPERTIES, LTD.,

Defendant-Appellant.

UNPUBLISHED
September 12, 2000

No. 208856
Kalamazoo Circuit Court
LC No. B-97-0552 CK

MARKET DEVELOPMENT CORPORATION and HARDING'S GALESBURG MARKET, INC.,

Plaintiffs-Appellees,

v

VILLAGE GREEN PROPERTIES, LTD.,

Defendant-Appellant.

No. 216600
Kalamazoo Circuit Court
LC No. B-97-0552 CK

Before: White, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant lessor appeals the trial court's grant of equitable relief to plaintiffs, declaring that plaintiff Market Development Corporation's (MDC) exercise of its option to renew the lease of the property at issue was deemed exercised despite being untimely under the lease agreement, and the court's grant of a permanent injunction precluding defendant from terminating the lease or otherwise interfering with plaintiffs' full enjoyment of the leased premises based on any claim that the first lease renewal option had not been timely exercised. (Docket No. 208856). In a consolidated case (Docket No. 216600), defendant challenges the trial court's finding that statements in several of defendant's briefs were not grounded in fact and based on reasonable inquiry and the briefs were thus signed in violation of MCR 2.114, and the trial court's award of $5,000 in sanctions against defense counsel. We affirm in No. 208856, and affirm in part and remand for further proceedings as to the amount of sanctions in No. 216600.

No. 208856

I

Plaintiff MDC is a real estate holding company and a wholly owned subsidiary of Spartan Stores, Inc., a wholesaler of grocery foodstuffs. Plaintiff Harding's-Galesburg Market (Harding's), a Spartan store, is a family-owned business and has operated grocery stores in western Michigan for over thirty years. Defendant Village Green owns a 60,000 square foot building at 6330 South Westnedge Avenue (6330 site) in Portage, Michigan, which is the subject of this suit. Joshua Weiner is defendant's general partner.

MDC had had an interest in a grocery store at 6026 South Westnedge Avenue (Southland site), contiguous to the Southland mall, since 1973. Harding's had operated the store since approximately 1992. Weiner controls the entity that owns Southland Mall.

In 1991, Weiner sought to acquire the Southland site from MDC. In 1993, Weiner and MDC discussed whether the 6330 site would be available to MDC. At that time defendant was leasing the 6330 site to American Stores for operation of a Jewel/Osco store.

American Stores and Spartan Stores engaged in negotiations regarding Spartan's acquiring American Stores' Michigan locations and, in February 1996, executed a formal purchase agreement which included the store at the 6330 site. In March 1996, Weiner submitted proposals to MDC for the purchase of the Southland site and simplification of the 6330 lease, which had in years previous been amended nine times. In April 1996, MDC accepted assignment of the 6330 site lease from American Stores and moved into the premises. The assigned lease provided for consecutive five-year option terms with the then-existing option term expiring in May of 1996. The lease contained four additional five-year option terms.

In May 1996, MDC submitted counteroffers to Weiner regarding the 6330 Site lease proposal and Weiner's proposed purchase of the Southland site. The parties met on May 15, 1996 to resolve the differences between the proposals. On June 30, 1996, MDC and defendant executed a simplified 6330 site lease (simplified lease) and closed on the sale of the Southland site to an entity controlled by Weiner. The simplified lease had an expiration date of May 31, 1997, and specified that written notice of renewal had to be received by the lessor no later than January 31, 1997.[1] The simplified lease also

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[1] Section 2.2 of the simplified lease provided:

> **<u>Options</u>**. Lessee has eight (8) option periods of five (5) years each to extend the term of this Lease. It shall be Lessee's responsibility to deliver to Lessor, pursuant to

(continued...)

incorporated the nine previous amendments, modified some of the terms,[2] and included a "time is of the essence" provision.

Plaintiffs incurred considerable expenses in moving to and preparing the 6330 site.

MDC did not mail written notice of renewal by January 31, 1997. By letter dated February 4, 1997, Weiner wrote to Mel Casey, Vice President of Real Estate, at MDC:

> Pursuant to the Lease Simplification Agreement by and between Village Green Properties, Ltd., a Michigan limited partnership, Lessor, and Market Development Corporation, a Michigan corporation, Lessee, the lease term for the captioned location shall expire May 31, 1997.

Casey received the letter on February 6, 1997 and called Weiner's office. By letter dated February 6, 1997, sent both by certified mail and fax, MDC's counsel wrote to Weiner:

> On behalf of Market Development Corporation, we hereby confirm Market Development Corporation's exercise of the option for the renewal period and the intention to continue in the Leased Premises until at least January 31, 2002. Should you have any questions or comments, feel free to give us a call.

(...continued)

> Section 12.1, written notice of its intent to exercise the option periods contained herein, which written notice shall be received by Lessor not less than four (4) months prior to the expiration of the then current term of the Lease. For purposes of clarification, Lessee must exercise the options provided herein no later than the following dates for the designated option period: January 31, 1997 (<u>First Option Period</u>) . . . The word "term" whenever used herein shall mean the original term and any extensions thereof unless the context otherwise requires. During any such optional extended term, all terms, conditions and provisions of this Lease shall remain in full force and effect.

Section 12.1 provided:

> **<u>Notices.</u>** Notices and demand required or permitted to be given hereunder shall be given by registered or certified mail and shall be addressed if to Lessor, at the last address at which rent is payable . . .

[2] The modifications included granting four additional five-year option terms, deleting the right of the tenant to terminate the lease at will, deleting the clause allowing the premises to be used for any purpose and substituting a clause allowing the premises to be used only as a grocery store with certain ancillary uses, increasing the common area maintenance, insurance and tax costs to be paid by MDC, and providing that these costs could be increased again after five years from the date of the simplified 6330 Site lease.

Plaintiffs brought this action seeking declaratory and injunctive relief, asking that the trial court declare as a matter of law and equity that the first renewal of the simplified lease had been exercised and that the lease remained in force beyond May 31, 1997.

Following a bench trial, the trial court entered judgment in plaintiffs' favor, stating that plaintiff MDC's first option to renew the lease for the 6330 site "is declared exercised, and the Defendant is permanently enjoined from terminating the Lease Simplification Agreement dated June 26, 1996 . . . or otherwise interfering with the Plaintiffs' full enjoyment of the leased premises based upon any claim that the first lease renewal option . . . was not timely exercised." This appeal ensued.

II

Defendant first argues that the trial court erred in refusing to enforce the simplified lease agreement, which was clear and unambiguous, under the circumstances that MDC and Village Green were of comparable sophistication and bargaining power, the agreement was made for a legitimate purpose and was reasonable and fair under the circumstances existing at the time the bargain was made, and the agreement did not violate public policy. Defendant asserts that courts are charged with enforcing agreements and will not make new agreements for the parties. Defendant relies on three cases holding that options must be strictly enforced. Plaintiffs do not dispute that the lease renewal option is clear and unambiguous or that the lease provisions are enforceable in law, but assert that the issue is whether equity can intervene to prevent forfeiture of a tenant's interest under the circumstance that strict enforcement of the contract would bring about an unreasonable or unconscionable result. We conclude that the trial court did not err in concluding that equity may intervene in appropriate circumstances.

This Court reviews equitable actions de novo, and findings of fact supporting the trial court's decision for clear error. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 210; 568 NW2d 378 (1997).

The trial court's opinion, read from the bench, stated in pertinent part:

> The case arises out of a lease simplification agreement signed on June 25th 1996. The agreement provided that Plaintiff Market Development Corporation had the option to renew the lease on January 31st, 1997. Plaintiff . . . did not provide written notice of intent to renew by this date and plaintiffs (sic [defendant]) stated that the lease would be terminated on May 31st, 1997.
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> There is no applicable case law on point in Michigan. The applicable national law is summarized in an ALR article entitled "Notice of Lease Renewal; Excusing Failure" found at 27 ALR 4th . . . 266. . .
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> On pages 270 and 271 in summarizing the law ALR says, "Ordinarily a provision in a lease requiring written notice to a lessor of the lessee's intention to exercise an option to renew the lease must be strictly complied with, and the notice must be given at the time and in the manner specified."

"But, at least in modern decisions, most courts have stated that equity will relieve against the consequences of a failure to give a notice at the time required when such failure results from accident, fraud, surprise or mistake, and that other special circumstances warranting equitable relief are present."

The article goes on to say, "Regardless of the reason for the failure in notice, it is generally stated that equity will intervene only if, one, the tenant's delay in renewing was slight; two, delay did not prejudice the landlord and, three, failure to grant relief would cause a tenant unconscionable hardship."

The article cites cases from nineteen states in support of that general proposition.

It is the finding of the Court that the six-day delay in renewing was slight.

It is the finding of the Court that the delay did not prejudice the landlord. There's minimal evidence that the six-day delay harmed the landlord. The multi-faceted negotiations between Plaintiff Market Development Corporation and defendant do not support any finding of prejudice to the defendant in a renewal of this lease.

It is the finding of the Court that failure to grant relief would cause the tenant unconscionable harm. In the few months the tenant occupied the premises substantial costly improvements were made by the tenant. The feasibility of relocation of the store is problematic.

The defendant argues affirmative defenses against equitable intervention that Plaintiff Market Development Corporation was grossly negligent and that defendant was fraudulently induced into the agreement and Plaintiff Market Development Corporation has unclean hands from the discharge of Pam Smith.

It is the finding of the Court that the delay in notice of renewal was an act of ordinary negligence. Evidence was that this was the only missed option deadline of Market Development Corporation and there was an adequate notice system in place which broke down because of increased workload and shortage of experienced employees.

It is the finding of the Court that the defendant was not fraudulently induced to enter into the agreement. The evidence does not support the claim that a statement of a representative of Market Development Corporation that sales are going to be 26 or 27 million dollars was a substantial inducement to the defendant. In any event, this year's sales are up to 24 million dollars and climbing.

It is the finding of the Court that Plaintiff Market Development Corporation does not have unclean hands from the discharge of Pam Smith. Her discharge is of questionable relevance to the issue of clean hands in the dispute between the parties. In any event, there appears to be nothing illegal about the discharge.

> Therefore, the relief prayed for in the complaint is granted and the defendant is enjoined from terminating the lease on the basis that the first renewal under the lease simplification agreement was not timely exercised.

Defendant is correct that a number of Michigan cases have stated the rule that strict compliance with the terms of an option is required. See, e.g., *LeBaron Homes v Pontiac Housing Fund*, 319 Mich 310; 29 NW2d 704 (1947), and *Rapanos v Plumer*, 41 Mich App 586, 588; 200 NW2d 462 (1972). However, defendant's argument ignores that equity, by its nature, most often applies in unusual circumstances, that the cases do not preclude equitable intervention, and that Michigan has long recognized that equity can and should intervene to prevent an unreasonable forfeiture or harsh result.

The defendant in *LeBaron* successfully moved to dismiss the plaintiff's complaint, which sought specific performance of an alleged contract to purchase property, on the basis that the written instrument was not a contract, but an option. Defendant in the instant case relies on the following passage from *LeBaron*:

> "An option is not a contract of purchase, it is simply a contract by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time. An option is but an offer, strict compliance with the terms of which is required; acceptance must be in compliance with the terms proposed by the option both as to the exact thing offered and within the time specified; otherwise the right is lost. [*LeBaron*, *supra* at 313, citing *Olson* v *Sash*, 217 Mich 604; 187 NW 346 (1922); *Bailey* v *Grover*, 237 Mich 548, 554; 213 NW 137 (1927).]

The issues in *LeBaron* were whether the agreement was an option or a bilateral contract of purchase and sale of the property, and whether the complaint sufficiently alleged that the option was accepted by the plaintiff and that the plaintiff complied with its terms thereby ripening the option into a contract binding on both parties. The plaintiff in *LeBaron* asserted a contractual right and did not purport to invoke the equity jurisdiction of the court. Nothing in *LeBaron* precludes a court from utilizing its discretion to intervene equitably given proper circumstances. Nor do the cases cited in *LaBaron* preclude the application of equity.[3]

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[3] In *Bailey*, *supra*, the Supreme Court reversed the trial court's award of specific performance to the plaintiff, who had failed to exercise an option to purchase a piece of apparently vacant lakefront property according to its terms. The Court observed that the plaintiff paid nothing for the sixty-day option when he obtained it, and did nothing to execute it until the last minute and then failed to comply with his oral promises or the terms of the option within its time limit. The Court said:

> We are not highly impressed by plaintiff's proof of diligence, *nor do we discover any overwhelming equities in his favor carrying the transaction beyond his strict legal rights.*

(continued...)

In contrast to the cases cited by defendant, Michigan cases supporting equitable intervention in cases where unconscionable harm would result include *Richmond v Robinson,* 12 Mich 193 (1864), in which specific performance of a contract to sell land was sought. Robinson and his wife, who owned real estate, mortgaged the property to Weeks, to secure the payment of three promissory notes they gave to Weeks, with payments to be made in September of three consecutive years. Robinson sold the mortgaged property to Barlow, who agreed to pay Robinson a sum on September 1st, and to make the required payments on the notes to Weeks. After the payment to Robinson was due, Barlow assigned the contract to Richmond. Richmond paid the first payment to Weeks on November 9th, and made the payment to Robinson on Novermber 15th. The following year, Richmond made a late, partial payment on the note to Weeks. Approximately six months later, Robinson served a notice of forfeiture on Richmond. Richmond then paid off all the notes to Weeks and sought a deed from Robinson. The contract provided that time was of the "very essence of this contract." The Michigan Supreme Court noted:

> The next objection is, that by the terms of the contract, it was expressly understood and declared that time is and shall be deemed and taken as of the very essence of the contract. Time is always of the essence of a contract when an act is required to be done within a specified time; as much so as the act itself, and no more. Every part of a contract is of its essence. It is not very clear what courts and text-writers who use this phrase mean, unless it be that a subsequent performance can not be decreed, under all the circumstances of the case, by a court of equity, by way of relieving against the forfeiture of the contract, without doing injustice to the party against whom the relief is asked. *This is the principle equity acts on in relieving against forfeitures. Nor will it, by any stipulation of the parties, be ousted of its jurisdiction, or refuse to relieve against the exaction of the pound of flesh, although the parties have, in express terms, stipulated for it.*

(...continued)

Thus, the *Bailey* Court recognized the possibility of granting equitable relief in an appropriate case.

Olson, supra, involved the plaintiff's attempt to exercise an option to purchase the defendants' farm on the last day of the four-month option period. The defendants were not home when the plaintiff came to call to exercise the option (on a Saturday), and the plaintiff left a note stating that he had been there and would call on Monday if he did not see them later in the day. The plaintiff was unable to locate the defendants or their attorney on Saturday, and when he returned on Monday, the defendants refused his tender of the purchase payment, stating that shortly after granting the option to the plaintiff, they had given a third party another option to take effect immediately upon the expiration of the plaintiff's option if not exercised. In reversing the trial court's grant of specific performance to plaintiff, the Supreme Court discussed the legal nature of an option and the requirement of strict and timely exercise and stated "We find no bad faith or misconduct on the part of defendants, no design to prevent acceptance, and nothing to entitle plaintiff to the relief prayed." *Olson* does not address the court's equitable powers and, in light of the second option, presents a fact situation that would not support equity's intervention.

> The first payment was not made within the time required by the contract, and no forfeiture was declared or insisted upon. In November following the forfeiture in September, both Robinson and Weeks were paid . . . . In April following, the notice of forfeiture, and for complainant to quit the premises, was given by Robinson. Thereafter, and during the same month, Richmond paid the balance due on the notes and mortgage to Weeks, the last note not being due until the following September. The object of the notice to quit from Robinson is too obvious not to be seen. It was to make $649.98 out of complainant. He had suffered no loss whatever, and Weeks, to whom the money was going, made no complaint. And after the notes and mortgage had been paid, the payment of which appears to have been the object he had in view in selling the premises, he refused to convey. A stronger case could not well be presented for the interposition of a court of equity. [*Id.* at 199-200. Emphasis added.]

In *Spoon-Shacket v Oakland Cty,* 356 Mich 151, 164-165; 97 NW2d 25 (1959), the plaintiffs sought a declaration of rights regarding an allegedly erroneous assessment and tax levy that they had failed to challenge in accordance with the applicable statute. In sustaining the taxpayers' challenge in equity, the Supreme Court noted regarding the maxim "equity follows the law":

> . . . . I [Justice Black for the majority] would advance initially the vigorous comment of another; the great juristic teacher of the present century [Justice Benjamin Cardozo]. That which follows is read and accepted today as righteous gospel in most of the courts and law schools of our land. It is submitted again (as in *Farr* v. *Nordman,* [346 Mich 266, 274; 78 NW2d 186 (1956)] as follows:
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> > "Equity follows the law, but not slavishly nor always. *Hedges* v. *Dixon County,* 150 US 182, 192 (14 S Ct 71, 37 L ed 1044). If it did, there could never be occasion for the enforcement of equitable doctrine. 13 Halsbury, Laws of England, p 68. * * *
> >
> > "True, indeed, it is that accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the consequences to be corrected might have been avoided if the victim of the misfortune had ordered his affairs with reasonable diligence. *United States* v. *Ames,* 99 US 35, 47 (25 L ed 295); *Grymes* v. *Sanders,* 93 US 55 (23 L ed 798); *Noyes* v. *Clark,* 7 Paige (NY) 179 (32 Am Dec 620). The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship. *Noyes* v. *Anderson,* 124 NY 175 (26 NE 316, 21 Am St Rep 657); *Lawrence* v. *American National Bank,* 54 NY 432; *Ball* v. *Shepard,* 202 NY 247, 253 (95 NE 719). Let the hardship be strong enough and equity will find a way, though many a formula of inaction may seem to bar the path. *Griswold* v. *Hazard,* 141 US 260, 284 (11 S Ct 972, 999, 35 L ed 678)." (Cardozo, C.J.,

> dissenting in *Graf* v. *Hope Building Corp.*, 254 NY 1 [171 NE 884, 70 ALR 984]).

In *Rothenberg v Follman*, 19 Mich App 383, 388-389; 172 NW2d 845 (1969), this Court noted:

> . . a court of equity has the power to relieve the defaulting purchaser from the forfeiture and to compel specific performance by the seller when in the court's judgment to do otherwise would result in an unreasonable forfeiture. Whether a particular forfeiture is unreasonable depends upon a number of factors, among them the amount and length of the default, the amount of the forfeiture (i.e., the sum of the amounts paid to the seller and the value of the property at the time of forfeiture less the contract price), the reason for the delay in payment and the speed with which equity's aid was sought.

In *Rapanos, supra*, a suit for specific performance of an option to purchase land, this Court affirmed the trial court's judgment for the plaintiff, where the record supported that the individual seller who did not receive notice of intent to purchase was not prejudiced because he had no legal interest in the property:

> As plaintiff's research suggests "strict compliance" with the terms of an option is the rule in Michigan. *Olson v Sash,* 217 Mich 604 (1922); *Bailey v Grover,* 237 Mich 548 (1927); *Beecher v Morse,* 286 Mich 513 (1938); *Bergman v Dykhouse,* 316 Mich 315 (1946).
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> Analysis of plaintiff's case authority, however, reveals an important and decisive distinction from this case. *Excusing noncompliance in the cases cited by plaintiff would have prejudiced someone who held an important interest in the optioned property. In the present case, the owner's son had no interest at all.* The case relied on by the trial court is more analogous to the present situation. In *Jefferson Land Co v Kannowski,* 233 Mich 210 (1925), the husband-seller, separated from his wife, obtained his wife's signature on an option which was later exercised by notice to the husband alone. In holding the notice to the husband operative on the wife as well, the Court stressed that the wife had no interest in the property which she could sell herself. All the wife had in the *Kannowski* case was an inchoate right of dower. In this case Robert Plumer has no legal interest whatsoever in the optioned property. [*Rapanos, supra* at 588.]

Although the Michigan cases do not involve the grant of equitable relief under the precise circumstances presented here, i.e., a lessee's failure to timely exercise an option to renew a lease, the cases discussed above support the trial court's exercise of its discretionary power to equitably intervene in the instant case. Further, as the trial court noted, the majority of jurisdictions[4] recognize the principle

[4] Defendant asserts that the trial court adopted the minority view. However, we believe this characterization to be inaccurate. While the annotation the trial court relied on, 27 ALR 4th 266,

(continued...)

that courts may exercise their equitable discretion to grant tenants relief from the consequences of failure to give timely notice of renewal under special circumstances.[5]

(...continued)

collects cases from 19 states adopting the view in particular cases that equity can appropriately intervene to prevent a forfeiture, cases from the remaining states rejecting that view are not presented. In other words, this does not appear to be a majority/minority view situation. Further, there are conflicting cases from the same state, e.g., cases from Connecticut and California have both accepted and rejected equity's intervention. Also, some states accept the possibility of intervention, but draw the line at the reason for the failure to timely exercise the option, denying relief where the tenant has been negligent.

[5] See *Car-X Service Systems, Inc v Kidd-Heller,* 927 F2d 511 (CA 10, 1991) (affirming district court's judgment that Kansas would follow prevailing rule in other jurisdictions that equitable relief may be available to a lessee who did not timely file notice to renew, noting that lessee sent renewal notice before lease expired, that to declare the lease forfeited would cause relatively great harm to lessee, lessee had customized the property, made alterations to it and leased adjacent property which it incorporated, lessee had been at the location for about ten years and there was customer recognition, and lessor would not suffer substantial harm where it had not taken substantial steps to lease premises to another although it had notified a real estate agent of the situation.); *33 Flavors Stores of Virginia, Inc v Hoffman's Candies, Inc,* 296 SC 37; 370 SE2d 293 (1988) (noting that "[w]here a lessee has a right to renew upon giving notice to the lessor at or before a specified time, in the absence of waiver, the giving of notice is a condition precedent which must be complied with within the stipulated time; and, *absent special circumstances warranting relief from a court of equity,* the right of renewal is lost if notice is not given in accordance with provisions of the lease."); *Friendship Park Property Corp v Shaw*, 505 So2d 456, 458 (Fla, 1987) (affirming lower court's denial of equitable relief because the delay in giving notice to renew to lessor was not slight and the loss of its lease would not result in unconscionable hardship); *Tartaglia v RAC Corp*, 15 Conn App 492, 494; 545 A2d 573 (1988) (noting that because the renewal notice was not timely "the defendant has no right to relief unless it can establish facts which warrant relief under equitable principles."); *In re Millyard Restaurant, Inc,* 110 BR 103, 104 (1990) (noting that "equity will give relief to a lessee who has failed to exercise the option [to renew a lease] within the required time, if the delay is slight, the delay has not prejudiced the landlord, and the failure to grant relief would result in such hardship to the tenant as to make literal enforcement of the renewal provision unconscionable."); *Gardner v HKT Realty Corp,* 23 Ark App 148, 153; 744 SW2d 735, 738 (1988) (noting that "[i]t is a generally accepted rule that the failure of such notice [to renew a lease] may be excused or relieved against in equity if fraud, accident, surprise, or mistake are shown to have caused the delay or there are other special circumstances warranting the relief. Under this rule, relief is warranted where . . . it is shown that the lessor has not changed his position or otherwise been prejudiced by the delay, and . . . that the enforcement of the covenant [to renew] will result in undue and inequitable hardship to the tenant."); see also cases cited in Anno, *supra*, and in 49 Am Jur 2d, Landlord and Tenant, § § 197-198, pp 195-196.

The general principles are set forth in 49 Am Jur 2d, Landlord and Tenant, § § 197-198, pp 195-196:

> Where a lessee fails to give a written notice within the time specified for exercising an option to renew a lease, equitable relief may be available under special circumstances to relieve the lessee from the consequences of that failure. This may be true even where the lease is clear and unambiguous. However, the circumstances in which equitable relief can be granted are considered very limited. Whether "special circumstances" exist for purposes of a court of equity granting relief from late renewal, depends on the facts of each case.
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> [§ 198] The determination of the court to grant relief from the giving of late notice of the intent to exercise a renewal or extension option turns not on a single factor, but on the balance of equities between the parties: the extent to which the lessor has changed position or otherwise been damaged, and the extent to which enforcement of the covenant would be an unconscionable hardship on the lessee. Thus, equitable relief may be available to a tenant who fails to give timely notice of an intention to exercise an option to renew or extend a lease, as required by the option, where the delay has been slight, the delay has not prejudiced the landlord, and the failure to grant relief will result in an unconscionable hardship to the tenant.
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> Equitable relief from late notification may also be allowed where the nonrenewal of the lease would result in a substantial forfeiture by the tenant, the landlord would not be prejudiced by the delay in renewal, and the tenant's failure to exercise the option in a timely fashion resulted from an honest mistake or inadvertence, or even negligence of the lessee, at least where the forfeiture would be out of proportion to the lessee's fault.

In *Pepper Pot II, Inc v Imperial Realty Co*, 133 Ill App 3d 951, 955; 479 NE2d 949 (1985), the court rejected an argument similar to that made by defendant in the instant case:

> Defendants further contend that the trial court erred in finding that plaintiff "properly exercised" its option to renew the lease because in Illinois such lease provisions are construed to be "privileges" and not rights, and that such provisions are therefore strictly enforced and a lessee's failure to exercise the option in conformance with the lease provisions will result in loss of the right to renew.
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> While such assertions find support in case law (Dikeman v. The Sunday Creek Coal Co. (1900), 184 Ill. 546, 56 N.E. 864; American National Bank v. Lembessis (1969), 116 Ill.App.2d 5, 253 N.E.2d 126), it is likewise true that case law recognizes that a lessee has a right to equitable relief from strict compliance with option to renew provisions when he demonstrates circumstances justifying such relief. (See, e.g., Ceres Terminals, Inc. v. Chicago City Bank and Trust Co. (1983), 117 Ill. App.3d 399, 72 Ill. Dec. 860, 453 N.E. 2d 735; Linn Corp. v. LaSalle National Bank (1981), 98 Ill.

> App.3d 480, 53 Ill.Dec. 885, 424 N.E.2d 676.) Upon remand, the trial court should afford the parties opportunity to introduce evidence relating to these principles.

We conclude that it was within the trial court's discretion to equitably intervene provided that plaintiffs established the requisite special circumstances. The propriety of the trial court's factual findings in that regard are addressed *infra*.

III

Defendant next argues that the trial court erred in finding that MDC and/or Harding's would suffer unconscionable harm if forced to comply with the simplified lease merely because Harding's made substantial improvements to the rental property and relocation for Harding's would be problematic. We disagree.

Members of the Harding family testified at trial that they incurred several million dollars in debt to relocate the grocery store from the Southland to 6330 site, and spent another several million on the 6330 site. Had Harding's been forced to relocate, it would have lost approximately one million dollars it spent on leasehold improvements. Harding's had expended almost two million dollars on equipment for the 6330 site and may not have been able to use it all if forced to relocate.

While defendant argues that it established that plaintiffs were offered alternative sites and a contribution towards their moving expenses, the testimony nevertheless overwhelmingly established that certain substantial leasehold improvements would likely be lost and that the costs would greatly exceed defendant's proposed contribution. The trial court's findings were amply supported by the record.

Defendant seeks to draw a crucial distinction between "unconscionable harm" and "substantial and significant harm," arguing that while the forfeiture here is substantial, it is not unconscionable because it is not the result of an agreement that was unconscionable when made. However, the question is not whether the lease is unconscionable, but whether the forfeiture would lead to unconscionable harm, and the fairness or unconscionability of the agreement is not the focus of the cases addressing the latter inquiry.

IV

Defendant next argues that the trial court erred because, despite finding that MDC's failure to give timely notice of renewal was based on MDC's negligence, the court nonetheless concluded that negligence did not bar the equitable remedy plaintiffs sought. We disagree. Equity's intervention is not barred by simple negligence.

Defendant provides no Michigan authority to support the proposition that a party's negligence precludes equitable intervention in its behalf, and several cases indicate that Michigan has not adopted that view. See *Lake Gogebic Lumber Co v Burns*, 331 Mich 315, 319-320; 49 NW2d 310 (1951) (noting that "[t]he rule is general that money paid under a mistake of material facts may be recovered back, although there was negligence on the part of the person making the payment; but this rule is subject to the qualification that the payment cannot be recalled when the situation of the party receiving the money has been changed in consequence of the payment, and it would be inequitable to allow a recovery," citing *Walker v Conant*, 65 Mich 194; 31 NW 786 [1887]). See also *Rothenberg*, *supra* at 390, in which this Court noted, in addition to the quoted portion set forth *supra* that:

> It is apparent that the delay in making the payment was relatively short, the amount in default was relatively small, the amount of the forfeiture was large both quantitatively and in relation to the balance owing and that the purchasers acted in good faith in offering to pay the entire balance owing. *They may have acted more diligently, but the delay in offering to pay and in commencing this action does not, considering the other factors just mentioned, preclude granting relief.* The trial judge did not err in deciding that the forfeiture which the sellers sought to retain for themselves was totally unreasonable and that he should exercise his equitable powers to relieve against it and to grant the purchasers specific performance of the contract.
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> * * *
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> The land contract in this case provided that time shall be of the essence. While there are judicial and textual statements that equity will not relieve against a forfeiture where the contract contains a time essence clause, this overstates the matter.
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> * * *
>
> . . . the fact that the parties have stipulated that time is of the essence is but one of the factors to be taken into consideration in determining whether equity will intervene to set aside a forfeiture. Where the forfeiture is disproportionately large and the other facts, circumstances and equities cry out for relief, a court of equity may, nevertheless, intervene.

See also, *Spoon-Shacket, supra* at 165 (stating "[t]rue, indeed, it is that accident and mistake will often be inadequate to supply a basis for the granting or withholding of equitable remedies where the consequences to be corrected might have been avoided if the victim of the misfortune had ordered his affairs with reasonable diligence. The restriction, however, is not obdurate, for always the gravity of the fault must be compared with the gravity of the hardship." Citations omitted.)[6] In light of these cases,

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[6] The ALR annotation the trial court relied on states in pertinent part:

> Courts have standards for determining when equitable relief is available to a lessee who fails to give notice within the time required for an option to renew. In various ways, courts have stated that there must have been a measure of good faith and diligence on the part of a lessee seeking to be relieved from the consequences of a failure in notice. No court has held or stated that equity will grant relief in cases of willful or gross negligence. In those cases in which the courts concluded that a failure in notice was due

(continued...)

we reject the argument that a lessee's negligence, no matter what its character, will automatically preclude equitable intervention.

We note that while defendant focuses on plaintiff's ordinary negligence as found by the trial court, other courts have focused on whether the failure to exercise an option was the result of an honest mistake or inadvertence, rather than mere neglect. In *Duncan v GEW, Inc*, 526 A2d 1358 (DC App, 1987), the court noted that "case law further distinguishes between mere neglect on the part of the lessee, in which case equity will not grant relief, and an honest mistake, which often permits the intervention of equity." The lessee in *Duncan* was twenty-three days late giving notice of renewal. In a footnote, the court noted that it was clear that the lessee's failure to provide timely notice of renewal was not the result of mere neglect:

> The evidence shows that Mr. Wedren fully intended to renew the leases, but that he mistakenly made an entry in his diary to give appellants thirty days' notice rather than ninety days' notice. Had G.E.W.'s delay resulted from mere neglect, rather than Mr. Wedren's honest mistake, we would be far less inclined to rule in its favor.

The court also observed:

> Several additional factors in this case support the granting of equitable relief . . . First, and most significantly, G.E.W. made substantial improvements worth more than

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(...continued)

to willful or gross negligence, such as where tenants had purposely delayed until the deadline had passed for giving notice, or who did not make an attempt to give notice, while knowing that such notice was required at a particular time, the courts have denied equitable relief. But, at least in modern decisions, most courts have stated that equity will relieve against the consequences of a failure to give a notice at the time required when such failure results from accident, fraud, surprise, or mistake, and there are other special circumstances warranting equitable relief. . . .

In a few jurisdictions, but not in others, the principle of equitable relief has been extended to cases in which lessees were at fault in giving late notice. In about half of the cases dealing with forgetfulness or inadvertence as the reason for failure in notice, equitable relief was granted. As stated in a leading case in which equitable relief was granted, the gravity of the loss would have been out of proportion to the gravity of the fault had there been a forfeiture.

Regardless of the reason for the failure in notice, it is generally stated that equity will intervene only if (1) the tenant's delay in renewing was slight, (2) delay did not prejudice the landlord, and (3) failure to grant relief would cause a tenant unconscientable [sic] hardship. [Anno, *supra* at 270. Emphasis added.]

> $400,000 in the fourteen properties at issue. Because of those improvements, appellants would receive a very substantial windfall if the strict terms of the option were enforced, while G.E.W. would suffer irreparable loss if equity did not intervene. Second, the delay in giving notice was slight; oral notice was provided within seventeen days of the deadline, and written notice six days after that. Third, the evidence shows that G.E.W. had made up its mind to renew the leases as early as the spring of 1983, when it obtained a loan from the bank, and that appellants had every expectation that G.E.W. would exercise its renewal options. In fact, appellants were fully aware of the improvements that G.E.W. was making . . . [and] did not rely to their detriment on G.E.W.'s failure to give timely notice of renewal; indeed, they were not even aware of the failure until approximately the sixteenth day after the deadline. In these circumstances we are convinced that forfeiture of the lease renewal options would be unconscionable. [*Duncan, supra* at 1364.]

See also *Fleming Cos, Inc v Equitable Life Ins,* 16 Kan App 2d 77; 818 P2d 813 (1991) (adopting the trial court's findings that "given recognition of an equitable interest in renewal by virtue of the character of the lease before the court, the slight delay, the obvious unconscionability that would attend the undesired abandonment of the lease by Fleming Companies, Inc., and the existence of absolutely no legal prejudice to the defendant Equitable Life Insurance Company of Iowa, that equity should intervene here as Fleming's conduct in arriving at its omission of notice was not intentional, indifferent, willful, or grossly negligent."); *Nanuet Nat'l Bank v Saramo Holding Co,* 153 AD2d 927, 928; 545 NYS2d 734 (1989) (noting that "equity will intervene to relieve a tenant of the consequences of an untimely notice of an exercise of an option to renew a lease if (1) the tenant's failure to exercise the option in a timely fashion resulted from an *honest mistake or inadvertence,* (2) the nonrenewal of the lease would result in a substantial forfeiture to the tenant, and (3) the landlord would not be prejudiced by the renewal.")

The record in the instant case supports that MDC's failure to timely renew the lease was an honest mistake and not "mere neglect." The record supports that MDC had a process in place under which staff completed lease summaries, which were then entered into the computer with pertinent dates, and staff received follow-up reminders accordingly. As discussed *infra,* because Pamala Smith, the employee who had been assigned the 6330 site lease summaries, left MDC on sick leave in August 1996 for several months, and because of staff turnover and increased business, the 6330 lease fell through the cracks. The system in place had prior thereto worked successfully. Under these circumstances, we agree with the trial court that equitable intervention was not precluded.

V

Defendant next argues that the trial court erred in failing to find that plaintiffs were grossly negligent and thus barred from obtaining equitable relief. We disagree.

Defendant did not establish that MDC engaged in conduct so reckless as to demonstrate a substantial lack of concern for whether an injury will result. *Jenings v Southwood,* 446 Mich 125; 521 NW2d 230 (1994). The evidence supported that MDC intended to make a long-term commitment to the premises, that defendant was aware of that through its knowledge that millions of dollars had been spent for the new site,[7] and that the failure to give timely written notice was an unintentional oversight. There was no evidence that MDC purposely or deliberately delayed giving notice, or that it made an affirmative decision to withhold notice, or that it was mindful at the time notice was required that the deadline was about to pass.

While defendant asserts that the record establishes that Casey had been informed that no lease summary had been prepared for the 6330 lease, and simply chose to do nothing, there was ample evidence to support plaintiffs' assertion that the memos relied on by defendant were status reports and did not specifically identify a problem, and that the failure to timely exercise the option was accidental and the result of simple negligence.

Regarding Harding's, the record made clear that MDC expected no notice of exercise from Harding's and understood that Harding's was committed to the property for the full 40 years. The trial court's findings were not clearly erroneous.

VI

Defendant next argues that the trial court erred by failing to conclude that the remedy plaintiffs sought was barred by the doctrine of unclean hands. This argument also lacks merit.

The clean hands maxim is a self-imposed restriction that closes the doors of equity to one tainted with inequitableness or bad faith *relative to the matter in which he seeks relief*, however improper the defendant's behavior may have been. *Mudge v Macomb Cty*, 458 Mich 87, 109 n 22; 580 NW2d 845 (1999). [Emphasis added.]

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[7] For example, plaintiffs submitted as an exhibit in support of their response to defendant's motion for summary disposition and their own motion for summary disposition an affidavit of Thomas Harding that stated in pertinent part:

> 5. Since moving, Harding's has expended more than $2.5 million in moving costs, equipment and renovations to the store.
>
> * * *
>
> 7. The improvements are open and obvious to any person who has shopped in the store.
>
> 8. As of January 31, 1997, certain improvements to the store were still in some stage of completion.
>
> 9. Harding's had every intention of staying in the new location past May 31, 1997, and in no way intentionally withheld notification to the Defendant.

Defendant argues that MDC had unclean hands based on its having terminated an employee, Pamala Smith, on the basis of a job-related disability. Defendant argues that this violates the public policy against firing an employee in retaliation for filing a workers' compensation claim, although defendant acknowledges that Smith never filed such a claim. Smith testified at trial that MDC hired her as a real estate administrator in December 1994, and that she later became a property manager. Casey was ultimately responsible for the 6330 site. As part of a system of checks and balances in place at MDC, Casey assigned to Smith the task of preparing lease summaries for the 6330 site sub-lease and prime lease. At that time the parties were working on the lease simplification agreement. Lease summaries included important dates and were collected by another MDC employee, Cynthia Dunakin, who returned them if incomplete, entered the lease summaries into the computer and then "tickled" the real estate associates for follow-up. Smith testified that in late 1995 she began having symptoms of colitis, including weight loss, which she attributed to pressure from her immediate supervisors. On August 10, 1996, Smith left work on sick leave. While on leave she suffered an injury, which extended her leave. She testified that she returned to work in October 1996 but that her supervisor sent her home, giving her the option to resign or be terminated, because the supervisor did not think Smith could handle the stress. Smith testified that she believed she had been doing a good job at MDC. Smith testified at trial that she did not want her personnel record to form part of the record and MDC's counsel noted on the record that given that Smith had asserted the right to privacy, the file would remain sealed. She testified that she accepted another job within a day of leaving MDC's employ, and that her health problems disappeared.

We conclude that the trial court did not clearly err in finding that there appeared to be nothing illegal about Smith's discharge and that the requisite willful misconduct was not shown. Smith's termination was of questionable relevance to the instant dispute (although the lease summary may not have fallen through the cracks had Smith still been employed, the alleged wrongdoing related to Smith and not to any dealings with defendant).

We also find no merit in defendant's additional argument that the trial court erred in rejecting its claim that fraudulent conduct by plaintiffs induced defendant to enter into the lease simplification agreement. Defendant argues that MDC knew that Harding's sales were projected at twenty-one million dollars, and that the simplified lease required sales of twenty-six to twenty-seven million dollars in order to bring the rent to the level paid under the old lease. However, defendant relies on an alleged admission of Mike Faulkner of MDC and an affidavit of Weiner. Faulker's testimony that he does not recall telling Weiner that he expected sales of twenty-six to twenty-seven million dollars and he does not think he would have shared volume figures or projections, but that he "could have" does not provide affirmative testimony that he did so. Weiner's affidavit is not evidence, and his actual testimony was more to the effect that Faulkner expressed a belief as to future sales. Thus, the trial court did not err in failing to find unclean hands based on fraud.

VII

Defendant next argues that the trial court erroneously found that it was not prejudiced by the delay. We disagree.

Plaintiffs' delay in providing notice of renewal to defendant was slight—at most six days. There was no evidence that defendant executed a new lease or received any offers to do so. Although defendant claims that it was prejudiced because plaintiffs were paying below-market rent, the majority of cases hold either that rental rate is irrelevant because the prejudice a landlord must establish must have arisen from the tenant's delay in providing notice to renew, or that rental rate is a factor to be considered in light of other considerations, including potential loss to the lessee.[8]

Defendant cites only one case in support of its position, *Western Tire, Inc v Skrede*, 307 NW2d 558 (ND 1981). *Western Tire* is distinguishable in that there is no mention of the lessee being prejudiced, unlike in the instant case, where Harding's would potentially lose several million dollars in leasehold improvements and equipment. In *Western Tire*, the tenant remained in the premises under a new lease, and the only issue was whether the tenant would pay the favorable rent set forth in the original lease or the higher market rent.

Moreover, defendant did not establish that it had prospective tenants to whom it could rent at a higher rate. The cite to the record that defendant provides to support the proposition that Weiner had prospective tenants to whom he wanted to lease the building, contains no such statement. Rather, Weiner testified that:

> Q All right. Did you know whether or not Harding's or M.D.C. wanted to renew this lease?
>
> A No.

---

[8] See *Gold Standard Enterprises, Inc v United Investors Mgmt Co*, 182 Ill App 3d 840, 846; 538 NE2d 636, 640 (1989) (noting that "[t]rue, the record shows that the rental value of the leased premises has appreciated in today's market. Defendant could charge a higher rent under a new lease. However, *the record contains no evidence that the actual delay in receiving the notice, by itself, harmed defendant."* [Emphasis added.]); *Fleming Cos, supra* at 819 (after noting that the rental amount was lower than market rate and the rental amount during the renewal period would decrease to a level substantially lower than market rate, the court stated, "[w]hile this factor is relevant, it does not appear dispositive in light of other considerations, most notably the potential $4.8 million loss by Fleming. Moreover, the rental rate for the renewal period is provided in the lease between the parties to which Equitable originally agreed." The court also noted that the market rental rate increase was due largely to improvements made by the lessee.); *Nanuet Nat'l Bank v Saramo Holding*, 153 AD 2d 927, 929; 545 NYS2d 734 (1989) (noting, "we agree with the Supreme Court's conclusion that the defendant did not establish that it would suffer prejudice by the renewal of the lease, other than the possible loss of a financial windfall. Significantly, the defendant obtained the assignment of the lease with full knowledge of the plaintiff's options to renew the lease for three additional 10-year terms. . . . in the absence of any indication that the defendant was relying on the nonrenewal of the plaintiff's lease, it should not be permitted to exact a substantial forfeiture based on the plaintiff's brief delay in complying with the notice requirement.")

> Q Are there good reasons that you considered in January of '97 why Harding's and M.D.C. might decide not to renew this lease?
>
> A Well, first of all, I didn't know. I couldn't know. There may have been reasons why they would not. This was a new experience for them, a new type of store for Harding's particularly, the Harding's Marketplace. I don't know whether it was an experiment that was working or not working in terms of profitability for them. That could be one reason.
>
> There were other developers and developments in the area that were cording [sic courting] tenants, retailers for their properties; could be possible that one of them may have corded [sic courted] Market Development and/or Harding's to be in their development.
>
> There were numerous reasons why they might not renew the lease.

The trial court did not err in finding that defendant was not prejudiced by the delay in exercising the option.

No. 216600

Defendant argues that the trial court erred in finding that its brief dated August 27, 1997 and trial brief dated October 2, 1997 violated MCR 2.114. Defendant further argues that the trial court's sanction of $5,000 was punitive and thus erroneous as a matter of law. Finally, defendant argues that the September 2, 1998 hearing held below did not meet minimum due process standards.

A

MCR 2.114 expressly applies to "all pleadings, motions, affidavits, and other papers" provided for by the court rules. MCR 2.114(A); 2.113(A).

> All documents must be signed, either by an attorney of record, or by an unrepresented party. The signature certifies that the signer has read the document, that it is well grounded in fact and warranted by existing law, and that it is not being used for an improper purpose. The court must impose an appropriate sanction if it finds a violation, either on motion of a party or the court's own motion. The sanction may include reasonable expenses and attorney fees, but not punitive damages. [Martin, Dean and Webster, MCR 2.114, Authors' Commentary, p 322.]

The imposition of a sanction under MCR 2.114 is mandatory upon a finding that a pleading was signed in violation of the court rule. *Schadewald v Brule*, 225 Mich App 26, 41; 570 NW2d 788 (1997); *Contel Systems Corp v Gores*, 183 Mich App 706, 710-11; 455 NW2d 398 (1990). The relevant inquiry on appeal is whether the trial court clearly erred in finding that the court rule was violated. *Contel, supra* at 711. A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

Where sanctions are awarded, they may include reasonable attorney fees and expenses, but not punitive damages. There is no precise formula for determining a reasonable attorney fee, but factors to be considered are:

> "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." [*Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982), quoting *Crawley v Schick,* 48 Mich App 728, 737; 211 NW2d 217 (1973).]

The trial court is not limited to these factors and need not detail its findings as to each specific factor. *Wood,* supra at 588. However, the court must make findings of fact regarding the attorney fee issue. *Petterman, v Haverhill Farms Inc,* 125 Mich App 30, 32; 335 NW2d 710 (1983). Where the opposing party challenges the reasonableness of the requested fee, the trial court should hold an evidentiary hearing regarding the issue. *Wilson v General Motors Corp,* 183 Mich App 21, 42; 454 NW2d 405 (1990). The trial court's award "will be upheld unless it appears upon appellate review that the trial court's finding on the "reasonableness" issue was an abuse of discretion. *Crawley, supra* at 737.

Generally, due process in civil cases requires notice of the nature of the proceeding and an opportunity to be heard; a full trial-like proceeding is not required. *KLCO v Dynamic Training Corp,* 192 Mich App 39, 42; 480 NW2d 596 (1991).

B

Plaintiffs filed their complaint on March 3, 1997. Defendant filed a motion for summary disposition under MCR 2.116(C)(8) on March 27, 1997, arguing for strict enforcement of the lease and against equitable intervention. Plaintiffs filed a response brief on May 5, 1997 arguing that defendant's motion should be denied and that summary disposition should be granted in their favor.

On May 23, 1997, defendant filed its answer and set forth affirmative defenses that included that plaintiffs lacked clean hands.

Defendant took Casey's deposition on June 25, 1997. MDC was requested to produce files relative to the 6330 site, including a "tax appeal file." MDC's counsel removed attorney/client communications from the file, but otherwise produced the tax-appeal file. The tax-appeal file pertained to a pending tax appeal filed by counsel for MDC's predecessor, Jewel Stores.

Defendant filed an amended motion for summary disposition on August 4, 1997, arguing that Harding's lacked standing to be in the case. On August 27, 1997, defendant for the first time asserted that plaintiffs had unclean hands on the basis that discovery had demonstrated that "MDC lied, cheated and stole in connection with the premises" by receiving a tax refund that belonged to defendant and by failing to pay defendant these monies.

Plaintiffs filed a reply brief on September 16, 1997,[9] and addressed defendant's argument that MDC had stolen the tax refund:

> . . . . Market Development never filed a tax appeal petition. Rather, as Defendant acknowledges, that petition had been filed by American Stores and continued after Market Development obtained possession of the property. Market Development did not receive a tax refund check and has since learned that a check is being held by the law firm of Honigman, Miller until such time as the proper owner to these funds can be discerned.
>
> Instead of simply inquiring of Market Development as to the existence or whereabouts of the check, Defendant chose to publicly accuse Market Development of a felony and to claim this Court should not grant Market Development equitable relief. Miller, Canfield, Paddock and Stone, P.L.C. apparently [allegedly] participated in this felony by hiding the documents during discovery. Defendant's decision to accuse Spartan Stores and Miller, Canfield, Paddock and Stone, P.L.C. of conspiring together, during the course of heated litigation, to deprive Village Green of a $7,000 refund check, strains all credulity.

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[9] Plaintiffs concede that they did not file with the clerk of the trial court their brief dated August 28, 1997, although copies were faxed to the trial judge and defendant. The brief was discussed at the August 29, 1997 hearing. However, as it is not in the trial court record and not reflected in the court's docket printout, we do not consider its alleged contents.

The trial court's opinion and order granting in part plaintiffs' motion for sanctions made reference to this brief. However, defendant filed a motion for reconsideration, and the trial court's corrected opinion and order denying defendant's motion for reconsideration stated in pertinent part:

> A review of the Court's file and pleading docketing system demonstrates that the pleading does not exists [sic] and is not a part of the Court's file. However, this discrepancy does not alter any substantive part of the Court's Opinion and Order.
>
> . . . . defense counsel has failed to cite an instance of palpable error by this Court and fails to establish that the Court would have reached a different disposition if the reference to the pleading was not included in the Opinion and Order. Inclusion of the reference to the pleading does not negate the fact that defense counsel would have been aware of the circumstances involving the tax refund check if a reasonable inquiry was made and that defense counsel did not object to the reference to the pleading when the September 3, 1998 Opinion and Order was submitted for signing.

In an affidavit filed September 18, 1997, Weiner referred to real estate taxes MDC had paid, adding that "[t]his sum does not include the refund received and unlawfully kept of $13,239.55." The trial court denied both parties' motions for summary disposition.

Defendant's trial brief, dated October 2, 1997, stated in pertinent part:

> 3. TAX REFUND THEFT
>
> The Court may recall at the introduction it was alleged that MDC lied, cheated and stole. The reference to stealing relates to a tax refund which will now be explained. Village Green is the owner of the property at 6330 South Westnedge. Village Green also owns the premises at 6420 South Westnedge which is rented to Dunhams Sports. Village Green receives the tax bills from the City of Portage. Village Green pays the taxes to the City of Portage. Under the terms of the lease with MDC, the tax bill is submitted to MDC for reimbursement of its portion.
>
> Unbeknownst to Village Green, American Stores had filed a petition to have the property taxes reduced. The petition included not only the Jewel/Osco leased premises, but also adjacent premises leased to Dunhams. Based on false representations, the taxing authorities proceeded on the petition without any notice to Village Green. The tax appeal was won and a tax refund of $13,239.55 was made.
>
> MDC was not entitled to the entire tax refund. Nonetheless, MDC never disclosed the tax refund to Village Green and never tendered the owner's or adjacent tenant's share of the refund. It appears as though MDC tried to hide the issue by claiming that certain documents were privileged during the deposition of Mel Casey. (Casey Dep, p. 184) The tax refund was discovered when some documents raising the issue were stumbled on at the deposition of Tom Harding. These documents were marked as Exhibits ##36 and 37. The specific amount of the refund and the date of issuance were obtained from the treasurer and are set forth in the Affidavit of Josh Weiner, sworn to August 27, 1997.
>
> There is no question that MDC had an obligation to refund a portion of these funds. **MDC has stolen tax refund monies paid by Village Green for these premises. The theft of these tax refunds by MDC is a demonstration of the kind of "unclean hands" that should bar any plea for equitable relief.** [Emphasis added.]

Defendant's proposed findings of fact, filed along with its trial brief, included:

> 38. Hardings [sic] and MDC have obtained a real estate income tax refund as a result of proceedings before the Michigan Tax Tribunal. A portion of that money does not belong to Hardings [sic] and/or MDC. None of said funds have been returned to Village Green by MDC and or Hardings [sic].

Defendant's proposed conclusions of law included:

> 13. There is also the matter of the real estate tax refund which has been obtained by MDC and/or Hardings [sic]. The evidence shows that the funds have been retained by MDC and/or Hardings including portions to which they have no claim. The retention of such funds constitutes bad faith and unclean hands which prohibits this Court from granting equitable relief to plaintiffs.

Trial began on October 9, 1997 and ended on October 23, 1997. The record establishes that the Honigman law firm, by letter dated October 8, 1997, sent a check to MDC in care of its counsel, Miller Canfield, for the 1996 tax refund, including interest, for the Jewel Companies property. By letter dated October 17, 1997, counsel at Miller Canfield wrote defense counsel:

> I have enclosed a copy of correspondence which was received in our office on October 10, 1997. Enclosed with this correspondence, Miller, Canfield, Paddock and Stone received a check in the amount of $4,877.49 from the law firm of Honigman, Miller. Miller, Canfield, Paddock and Stone has not cashed this check, but is holding this check until the parties entitled to all, or a portion of, the check amount can be properly determined. In this regard, we read the Lease Simplification Agreement as stating that Market Development Corporation is entitled to all tax refunds.
>
> To aid us in ascertaining whether this is, in fact, the case, we request that you, or Joshua Weiner, provide us with a written statement outlining Village Green Properties' basis for claiming it is entitled to all, or a portion of, the check. We look forward to your response.

By letter dated October 28, 1997, Pamela Sell, Legal Administrator for Weiner wrote defense counsel:

> RE: Jewel Companies/Market Development Corporation Tax Appeal
>
> Dear Sam:
>
> Josh told me of your meeting Monday regarding the captioned. I had reviewed my file upon receipt of David Hasper's [Miller Canfield attorney] letter of October 17, 1997, and thought I'd share some information with you.
>
> The Consent Judgment was entered April 25, 1997 (Docket No. 227534). According to Sharon Cubitt at the Kalamazoo County Treasurer's office (616-384-8124), a check in the amount of $13,239.55 was cut jointly to: Honigman, Miller, Schwartz and Cohn and Jewel Companies (Petitioner), on June 16, 1997.
>
> * * *
>
> I also researched the Lease for relevant language. Section 11.1(b) states in part: "For the purposes of this Section, the general real estate taxes and special assessments applicable to the Leased Premises shall be deemed a <u>pro rata share of the general real</u>

> <u>estate taxes and special assessments levied on the Shopping Center premises</u>; . . . " (emphasis added).
>
> Section 11.1(c) states in part: "Lessee may in its own name or in the name of Lessor, contest the validity or amount of any such taxes or the assessments upon which the same are based, and Lessor agrees to render to Lessee all assistance reasonably possible, including joining in and signing any protest or pleading . . . . If any rebate of such taxes is made, the rebate shall belong to Lessee. . ."
>
> Josh and I agree that, although Tenant was and is entitled to contest the real estate tax assessment, Tenant is only entitled to receive their pro rata share of a successful appeal.
>
> * * *
>
> Jewel Companies and Market Development should issue a joint check payable to Village Green Properties, LTd. And Dunham's Athleisure, in the amount of $2,993.46. It certainly is not that much money, it is not going to us, and it would right a very serious wrong.
>
> Please convey this information to David Hasper, et. [sic] al. Thanks.

The letter is carbon copied to Joshua Weiner.

Plaintiffs filed a motion for sanctions pursuant to MCR 2.114 and MCL 600.2591; MSA 27A.2591 on five separate grounds, one of which was the repeated arguments that MDC had stolen a tax refund check belonging to defendant. Plaintiffs' motion sought total attorney fees (for the five grounds) of $242,995 in favor of MDC and $53,112.50 in favor of Harding's. Plaintiffs' attorneys submitted affidavits, both of which averred that "[t]his matter involved significant issues and dollars and required a substantial amount of time and costs to handle," and set forth their respective fees to date, as stated above. Plaintiffs submitted an itemized bill of costs for $4,391.92.

Defendant opposed plaintiffs' motion and filed an objection to plaintiffs' bill of costs, objecting or qualifiedly objecting to all but $251.00. The trial court reserved decision on plaintiffs' motion for sanctions because defendant had filed a claim of appeal from the judgment, and granted in part plaintiffs' request for costs, in the amount of $1,646.30.

By order dated July 30, 1998, this Court granted plaintiffs' motion to remand, allowing plaintiffs to file a motion for the trial court to render its decision on their motion for sanctions. On remand, the trial court granted plaintiffs' motion for sanctions, stating:

> I find that the statements in pleadings that Plaintiff Market Development Corporation had stolen tax refunds of the defendant were not well grounded in fact and were not based on reasonable inquiry.

> On August 27, 1997, the Defendant raised the specific allegation that by unclean hands he meant that MDC had stolen tax refunds. This was set forth in the filed affidavit of Mr. Weiner and the Defendant's Brief. The Plaintiff filed a response on August 28, 1997,[[10]] which included a copy of correspondence to the Honigman law firm addressing the fact that Honigman still had whatever monies were recovered and that they should be held in trust until such time as the issue of their entitlement could be resolved. Again, on September 16, 1997, the Plaintiff filed a further brief with the Court declaring that no check had yet been received from the Honigman firm. If the Defendant still had any question about the status of the refund, they certainly did nothing to address these by undertaking any further inquiry. Instead, in their trial brief dated October 2, 1997, the defendants again alleged to the Court that a theft had occurred. In the Plaintiffs' trial brief of October 2, 1997, Honigman's letter to MDC confirming that Honigman still had the refund check, was attached. The Defendant's response was to completely disregard all of the information and press forward with claims in their trial brief and at trial that MDC had stolen money from them.

> These documents were signed in violation of MCR 2.114. The Court must impose an appropriate sanction. The court finds that reasonable expense incurred because of the filing of these documents is an attorney fee of five thousand dollars.

> Therefore, the motion for sanctions is granted. It is ordered that Defendant Village Green Properties, Ltd., and attorney Samuel T. Field shall pay to the Plaintiffs the sum of five thousand dollars.

Defendant filed a motion for reconsideration,[11] which the court denied by opinion and order entered December 22, 1998.

While the trial court could have taken a more benign view of defendant's allegations regarding the check by focusing on the fact that the refund was discovered during discovery, neither defendant nor Dunhams had been notified, and MDC might have intended to retain the entire proceeds, the court did not clearly err in deciding that at least some of the documents filed by defendant were not well grounded in fact after reasonable inquiry. Defendant should have realized at some point that the proceeds of the tax appeal had not been disbursed, so MDC had not stolen any money, and that the tenants, not the landlord, were entitled to the refund. The finding regarding the August 27 brief is questionable because defendant had not yet been told that the Honigman firm still held the check. However, as observed by

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[10] See n 9, *supra*.

[11] See n 9, *supra*.

the trial court in its ruling on the motion for reconsideration, this information was communicated in September, yet defendant persisted in its allegations.

As to the attorney fee and due process issues, the hearing on remand was quite abbreviated because the trial judge had a criminal trial waiting, and was concerned about the 56-day time frame imposed by this Court. Defense counsel attempted to delve into issues that the court thought were irrelevant or self-evident. While the trial court did not err in limiting the examination in some respects, it cut defendant short in its efforts to address the reasonableness of the fee. There is no record regarding the amount of time spent by plaintiff in responding to defendant's allegations regarding the theft. Because defendant was never able to develop a record or make a full argument on the amount of the sanction award, we remand for further proceedings on this issue.

We affirm in No. 208856, and affirm in part, and remand in part in No. 216600.

/s/ Helene N. White
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter