

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

REAL PROPERTY AT 7649 SOUTH CORK
ROAD,

Defendant,

and

ROCKY HAWKINS and DAWN HAWKINS,

Claimants-Appellees.

UNPUBLISHED

February 8, 2007

No. 271532

Shiawassee Circuit Court

LC No. 06-003608-CZ

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition under MCR 2.116(C)(10) in favor of claimants in this forfeiture action. We affirm.

We review a grant of summary disposition under MCR 2.116(C)(10) de novo. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). The documentary evidence submitted by the parties is viewed in the light most favorable to the party opposing the motion. *Id.* Summary disposition under MCR 2.116(C)(10) is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiff first argues that the trial court erred in granting summary disposition to claimants because the prompt filing requirement of MCL 333.7523 did not apply to the real property at issue because it was never seized. It is unnecessary to determine whether the real property at issue was actually seized within the meaning of Michigan law regarding forfeiture because, regardless of whether the real property was seized, plaintiff is not entitled to relief based on its argument that it was not seized.

“A forfeiture proceeding brought under the controlled substances act requires the seizing agency to be in possession or control of the res in order to vest the court with jurisdiction to enter an order of forfeiture.” *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 343; 532 NW2d

915 (1995). Plaintiff essentially argues that a law enforcement agency can gain control of property for purposes of a forfeiture proceeding by means such as the recording of an affidavit giving notice of a claim to the property, as was done in this case, without actually seizing the property. Plaintiff notes that this Court has held that the filing of a notice of lis pendens against real property constituted an exercise of control over the property sufficient to vest jurisdiction of a forfeiture complaint in the circuit court. *Id.* at 344. As part of its dispositive analysis in a case involving forfeiture under the controlled substances act, this Court stated in *In re Forfeiture of \$109,901*, 210 Mich App 191, 193; 533 NW2d 328 (1995), that “the time of seizure is when the government’s right of forfeiture arises.” Contrary to plaintiff’s assertion, Michigan law allowed plaintiff the right to institute this forfeiture action regarding the real property only if that property had been seized.¹ Accordingly, plaintiff is not entitled to relief based on its argument that the real property at issue was not seized, because if it was not seized then claimants would still have been entitled to summary disposition based on a lack of jurisdiction over the property. Thus, the trial court would have properly granted summary disposition to claimants even if for a wrong reason. See, e.g., *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005) (a trial court ruling may be upheld where a right result is reached for a wrong reason).

Plaintiff also argues that the trial court erred in concluding that this forfeiture action was not promptly instituted. In considering whether a forfeiture proceeding was instituted promptly, this Court must consider: (1) the lapse of time between the seizure and filing of the complaint, (2) the reason for delay, (3) resulting prejudice, and (4) the nature of the seized property. *In re Forfeiture of \$109,901*, *supra* at 195.

Initially, neither plaintiff’s proffered reasons for delay, nor claimants’ assertion that they were prejudiced due to making mortgage payments on the real property, was properly supported by documentary evidence as required to be considered in the context of a motion for summary disposition under MCR 2.116(C)(10). Plaintiff merely asserted in its response to claimants’ motion for summary disposition that the delay related to the federal government considering whether to institute a forfeiture action against the subject property. However, in evaluating a motion for summary disposition under MCR 2.116(C)(10), “the substantively admissible evidence actually proffered in opposition to the motion” should be considered. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Accordingly, “[a] litigant’s mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10).” *Id.* Plaintiff presented no substantively admissible evidence such as affidavits to support its claimed reasons for delay, but rather stated only that it could establish these factual claims. Plaintiff has simply failed to present any substantively admissible evidence regarding the reason for delay. Thus, plaintiff’s unsupported allegations regarding the reason for delay must be disregarded.

¹ There is no inherent conflict between *In re Forfeiture of 19203 Albany*, *supra*, and *In re Forfeiture of \$109,901*, *supra*, in this regard because they can be harmonized by concluding that the filing of a lis pendens against real property constitutes a seizure of that property for purposes of Michigan controlled substances forfeiture law.

A motion for summary disposition under MCR 2.116(C)(10) “must be supported by affidavits, depositions, admissions, or other documentary evidence.” *Reed v Reed*, 265 Mich App 131, 140; 693 NW2d 825 (2005). Claimants did not support the assertion that they made the claimed mortgage payments with any appropriate documentary evidence, but only with arguments of counsel and an unsworn statement from claimant Rocky Hawkins. Thus, the trial court erred in relying on the alleged mortgage payments as evidence of prejudice. Further, claimants have presented no evidence establishing any particular prejudice from the delay. Viewing the evidence in the light most favorable to plaintiff as the nonmoving party, *Greene*, *supra* at 507, a reasonable factfinder could conclude that claimants suffered no prejudice from the delay, particularly because they retained physical possession of the real property.

Prejudice resulting from delay is, however, only one of the four factors articulated by this Court for determining whether a forfeiture proceeding was instituted promptly. *In re Forfeiture of \$109,901*, *supra* at 195. The other three factors, lapse of time, reason for delay, and nature of the seized property, *id.*, weigh in favor of claimants. The only date that could reasonably be treated as the date of seizure would be the date the affidavit was filed regarding plaintiff’s claim to the real property. The complaint in this case was not filed until five months following the seizure. In *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 70; 512 NW2d 49 (1993), a delay of over four months occurred between the seizure of property and the filing of a complaint for forfeiture. This Court expressed that it would be inclined to view the lapse of time as excessive where there appeared to be no excuse for the delay. *Id.* at 72-73. The five-month delay in this case, considered in light of the lack of any properly considered evidence regarding the reason for delay, was also excessive. Further, in *Lenawee Prosecutor v One 1981 Buick Two-Door Riviera*, 165 Mich App 762, 767; 419 NW2d 458 (1988), this Court stated that “even a strained construction” could not consider forfeiture proceedings instituted six and one-half months after a vehicle was seized as prompt. Similarly, it would go beyond even a strained construction to regard the five-month delay in this case as involving a prompt institution of this forfeiture action. Thus, the factors of the lapse of time and reason for delay strongly weigh in favor of concluding that this forfeiture proceeding was not instituted promptly.

The remaining factor is the nature of the seized property. In *In re Forfeiture of One 1983 Cadillac*, 176 Mich App 277, 281-282; 439 NW2d 346 (1989), this Court concluded the nature of the seized property favored the claimant with regard to an automobile because it “was inherently harmless and therefore of little interest to the government.” Similarly, here, it is apparent that the real property at issue is “inherently harmless,” so this factor favors claimants as well.

Notwithstanding the trial court’s improper consideration of prejudice as a factor, it did not err in granting summary disposition to claimants because they were entitled to judgment as a matter of law under MCR 2.116(C)(10) in light of the length of delay, the lack of any properly considered evidence explaining the delay, and the nature of the property. See, e.g., *Hess*, *supra* at 596.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio