

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM TRAYNOR and PATRICIA
TRAYNOR,

Plaintiffs-Appellants,

v

JOSEPH C. MCMILLEN,

Defendant-Appellee.

UNPUBLISHED
August 5, 2010

No. 289284
Oakland Circuit Court
LC No. 2007-085355-NM

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

GLEICHER, J. (*concurring*).

I concur with the majority in result, but write separately to express my disagreement with two aspects of the majority's analysis regarding the Deer Run matter.

The majority concludes that because plaintiff William Traynor neglected to "identify an investment that would have guaranteed ... eight percent interest," his "no loan" damages theory "fails for lack of adequate substantiation." *Ante* at 6-7. In my view, plaintiff's "no loan" damage hypothesis should be rejected because it bears no relationship to the acts of negligence alleged by plaintiff and is precluded by the full credit bid rule. Contrary to the majority's analysis, the evidence otherwise substantiated the reasonableness of an eight percent interest figure.

The "no loan" theory proffered by plaintiff asserts that had he kept his money rather than investing in Deer Run, he would have \$350,000 in hand for alternate investments. According to plaintiff, the money could have been invested "at even 8% per year using simple interest," which would have yielded a significantly larger cash sum. But regardless of any alternative investment opportunities available to plaintiff when he opted to loan money to Deer Run, defendant's legal malpractice did not proximately cause plaintiff to suffer any damages. Plaintiff testified at his deposition that he loaned Deer Run \$350,000 because he believed the investment would "enhance [his] monetary position." Plaintiff explained that the attractiveness of the investment included a 10% interest rate.¹ When plaintiff made the loan, he believed that he had a first-

¹ Had defendant's negligence actually caused plaintiff damages, evidence of the loan's 10% interest rate would have sufficed to reasonably support plaintiff's claim that he could have made
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priority mortgage on the land that secured the investment and reduced his risk. Plaintiff further averred at his deposition that the \$350,000 loan “was a guaranteed investment. It was guaranteed . . . by the property.” Thus, plaintiff’s testimony reflects his clear understanding that if the borrower defaulted, the value of the property would suffice to cover the amount of his loan. This bargain envisioned that in the foreseeable event the loan was not repaid, plaintiff would be made whole through an interest in the property, instead of through principal and interest payments.

Although defendant negligently failed to advise plaintiff that other secured creditors stood in higher priority, plaintiff eventually obtained title to the land, precisely the same satisfaction of the borrower’s indebtedness as contemplated in the original bargain. In other words, defendant’s failure to perform a title search did not proximately cause any damages because plaintiff received one of the alternatives for which he had bargained. Regardless whether defendant neglected to reveal that other secured creditors had higher priority interests in the land, plaintiff ultimately obtained it. Consequently, the evidence reveals no causal link between defendant’s negligence and any damages attributable to the foreclosure.

The full credit bid rule also supports summary disposition in defendant’s favor. The full credit bid rule envisions that a lender who makes a full credit bid at a foreclosure sale takes title to the property in full satisfaction of the underlying debt. *New Freedom Mortgage Corp v Globe Mortgage Corp*, 281 Mich App 63, 68; 761 NW2d 832 (2008). In *New Freedom*, this Court applied the full credit bid rule to bar the plaintiff’s action against a nonborrower third party. *Id.* at 74-75. Plaintiff’s brief does not address the full credit bid rule, and I can discern no reason to forbear its application against a nonborrower third party under the circumstances presented here.

I also respectfully disagree with the majority’s analysis of plaintiff’s claim for noneconomic damages. I would hold that the circuit court correctly granted summary disposition of plaintiff’s noneconomic damages claim because he did not put forward *any* evidence of emotional or mental injury. Plaintiff’s complaint does not set forth a claim for noneconomic damages. Plaintiff’s answers to interrogatories relating to damages include no mention of noneconomic injuries, but instead assert that \$350,000 represents “the exact amount of damage

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an investment yielding 8% interest. MCR 2.116(C)(10) permits summary disposition when, “[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” A genuine issue of material fact exists when the evidence submitted “might permit inferences contrary to the facts as asserted by the movant.” *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). The majority’s criticism of plaintiff’s failure to “identify an investment that would have guaranteed him eight percent interest” is entirely misplaced, given that the parties agreed that the \$350,000 investment at issue would have guaranteed an even higher interest rate. Had plaintiff shown any link between defendant’s negligence and his alleged damages, this circumstantial evidence and the inferences it supports would have sufficiently substantiated the reasonableness of an eight percent interest yardstick and defeated summary disposition. Furthermore, “[i]t is well established that, where the fact of liability is proven, difficulty in determining damages will not bar recovery.” *Reisman v Wayne State Univ Regents*, 188 Mich App 526, 542; 470 NW2d 678 (1991).

you claim to have sustained.” Plaintiff’s deposition likewise made no mention that he had suffered emotional or mental distress. Had plaintiff pleaded and put forward some facts supporting even a reasonable inference of noneconomic injury, he would have survived defendant’s summary disposition motion. However, because the record is entirely devoid of any evidence of this late-raised claim, I agree with its summary dismissal.

/s/ Elizabeth L. Gleicher