

STATE OF MICHIGAN
COURT OF APPEALS

AUTOWHIRL AUTO WASHERS, LLC,

Plaintiff-Appellant,

v

TAZMANIA GROUP, LLC,

Defendant-Appellee.

UNPUBLISHED

August 8, 2006

No. 267359

Wayne Circuit Court

LC No. 05-501581-CH

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

In this action seeking specific performance of an alleged contract to purchase real property, Autowhirl Auto Washers, LLC (Autowhirl) appeals as of right from an order granting Tazmania Group, LLC's (Tazmania) motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10) and denying its motion for summary disposition pursuant to MCR 2.116(I)(2). Autowhirl also challenges the circuit court's subsequent order setting aside its May 10, 2005, order and nullifying the April 26, 2005, order of the district court, which had awarded possession of the subject real estate to Tazmania but allowed Autowhirl to remove car wash equipment from the building. We affirm.

I. Facts and Procedural History

Autowhirl began operating a car wash on the subject property in October of 2002. Autowhirl had contracted to purchase the property by land contract from First Independence Capital Corporation (FICC). Tazmania held a first mortgage on the property with FICC. Autowhirl failed to make timely payments on the land contract or to pay the property taxes or water bills on the property, and Tazmania foreclosed and was the successful bidder at the foreclosure sale. Tazmania attempted to negotiate a sale of the property to Autowhirl, which was still operating its car wash on the property. The parties entered into a written Offer to Purchase Real Estate, but they did not agree on an interest rate.

After two months of negotiations, Tazmania filed an eviction action in the district court. At approximately the same time, Autowhirl filed an action in the circuit court seeking specific performance of the Offer to Purchase. On March 30, 2005, the district court ruled in Tazmania's favor in the eviction action and Autowhirl filed a motion for reconsideration in the district court and a claim of appeal in the circuit court. Both circuit court cases were assigned to a single

judge, but were never consolidated. This appeal involves issues raised in both circuit court proceedings.

This matter involves extensive litigation and a series of claims so lengthy and so tenuously linked to the real underlying issues that we question the benefit of such litigation to the parties. That being said, the two real issues here are whether the Offer to Purchase is a valid and enforceable contract, and who owns the car wash equipment. We believe both are easily resolved.

II. Standard of Review

We review a lower court's determination regarding a motion for summary disposition de novo. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). A trial court may grant a motion under MCR 2.116(C)(7) when a party is barred from raising a claim because of the effect of a prior judgment, such as by collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). In considering a motion under MCR 2.116(C)(7), "the court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Id.*

A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999). In reviewing a motion under MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *MacDonald, supra* at 332.

III. The Offer was not a Valid Land Contract

These two parties were clearly negotiating the sale of land by a land contract, but had, in writing, only gotten so far as the Offer to Purchase. We find that the Offer to Purchase did not contain all the essential terms for a land contract, such that it could be enforced by the circuit court. A contract for the sale of land and a "land contract" are two different legal documents: "A contract for the sale of land is, quite simply, a purchase agreement . . . A land contract is . . . an executory contract in which legal title remains in the seller/vendor until the buyer/vendee performs all the obligations of the contract while equitable title passes to the buyer/vendee upon proper execution of the contract." *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999). Unlike a purchase agreement, or contract to purchase land, "the amount and time of installment payments and the rate of interest . . . were (and are) essential elements of a land contract." *Id.*

In addition, the Offer to Purchase unambiguously stated that the "full terms of sale shall be set forth in the Land Contract . . ." Given the absence of an agreed upon interest rate, and the quoted provision indicating that an actual Land Contract would be drafted subsequent to the Offer, we find that the circuit court correctly found that the Offer was not an enforceable contract for the sale of land.

IV. The Car Wash Equipment is a Fixture

Tazmania argues that the courts correctly awarded it possession of the car wash equipment because the equipment was a fixture to the real property. We agree. “An item is a fixture if (1) it is annexed to realty, (2) its adaptation or application to the realty is appropriate, and (3) it was intended as a permanent accession to the realty.” *Fane v Detroit Library Comm*, 465 Mich 68, 78; 631 NW2d 678 (2001).

Annexation can be actual or constructive; if “the item cannot be removed from the building without impairing the value of both the item and the building.,” it is constructively annexed. *Fane, supra* at 80. In this case, it is not disputed that the car wash equipment was physically annexed to the building. Autowhirl also never challenged the fact that the removal of the equipment from the building would result in damage. The equipment was clearly annexed to the property under either the actual or constructive definition.

Intent to make an item a permanent accession is determined by looking at circumstances such as “the nature of the article affixed, the purpose for which it was affixed, and the manner of annexation”; the “secret subjective intent” of the annexor is not relevant. *Wayne Co v Britton Trust*, 454 Mich 608, 619-620; 563 NW2d 674 (1997). We find that the evidence here demonstrates an intention to permanently annex the car wash equipment to the building.

This equipment was attached to an abandoned building to allow Autowhirl to operate a car wash from the site. Autowhirl had entered into a land contract to purchase the property before installing the equipment, indicating they intended to remain on the property with the equipment. There is no indication that Autowhirl had any intention, or the ability, to transfer the car wash equipment to a different piece of real estate. We find that the car wash equipment was a fixture, and it is therefore part of the real property and belongs to Tazmania. See *Sequist v Fabiano*, 274 Mich 643; 265 NW 488 (1936) (fixtures are part of the real property that transfer to the purchaser of the property at a foreclosure sale).

We find that because the Offer to Purchase is insufficiently detailed to serve as a valid and enforceable land contract, Autowhirl’s claims for specific performance and breach of contract fail, and because the equipment is a fixture, Autowhirl’s claim of ownership of the equipment likewise fails. Although these rulings are dispositive of the key issues, we will briefly address Autowhirl’s remaining claims.

V. Tazmania’s Alleged Admission and Default

Autowhirl argues that Tazmania’s failure to respond to Autowhirl’s request for admissions constitutes an admission that the Offer to Purchase was valid and enforceable. We disagree. Tazmania timely filed its answer to Autowhirl’s complaint, and in its answer, Tazmania specifically denied that the Offer to Purchase set forth the complete terms of the sale,

that it had a contractual obligation to convey the property to Autowhirl, or that it had breached an express contractual obligation. We find that the requirements of MCR 2.312(B)(1)¹ are satisfied.

Autowhirl also argues that Tasmania defaulted by not filing an answer to Autowhirl's amended complaint, and asserts that the circuit court was required to enter a default judgment against Tasmania. Again we disagree.

Tasmania had been actively involved in the litigation of this case, both in the district and circuit courts, and had filed an answer to the original complaint. The additional claims in the amended complaint relied exclusively on the enforceability of the Offer, and the circuit court had already ruled against Autowhirl on that issue. We find that a default judgment against Tasmania for failure to reply to claims that were clearly foreclosed by the court's prior ruling would be inappropriate.

VI. Collateral Estoppel

Autowhirl argues the circuit court's determination, in the district court appeal, that the Offer to Purchase was unenforceable did not have collateral estoppel effect in the circuit court specific performance/breach of contract action. We disagree. This is a very clear case of collateral estoppel: the same parties litigated the underlying fact issues fully and fairly, and both would have been bound by the court's decision no matter what was decided.²

VII. Jurisdiction Issue

When the district court issued an order granting possession of the car wash equipment to Tasmania, Autowhirl filed a motion for reconsideration in the district court, and the next day filed a claim of appeal in the circuit court. The district court granted the motion for reconsideration and after reconsidering, entered an order allowing Autowhirl to remove the equipment. However the circuit court entered an order prohibiting Autowhirl from removing the car wash equipment. Autowhirl argues the circuit court improperly entered that order, given the district court's resolution of the ownership of the equipment.

We disagree. Once the claim of appeal was filed, the district court lacked jurisdiction over the proceedings and could not enter any order. MCR 4.201(N)(3)(b) ("The filing of a claim

¹ "Each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter." MCR 2.312(B)(1)

² See *Storey v Meijer, Inc*, 431 Mich 368, 373 n 3; 429 NW2d 169 (1988) (Generally, for collateral estoppel to apply three elements must be satisfied: (1) "a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment"; (2) "the same parties must have had a full [and fair] opportunity to litigate the issue"; . . . and (3) "there must be mutuality of estoppel.").

of appeal together with a bond or escrow order of the court stays all proceedings . . .”). The circuit court properly entered its order to preserve the status quo while this litigation was pending. See MCR 3.310(B)(1)(a).

VIII. Motion for Disqualification

Finally, Autowhirl challenges Wayne Circuit Court Judge Michael Sapala’s denial of its motion for disqualification and subsequent motion for reconsideration, and Chief Judge Mary Beth Kelly’s affirmance of those orders. We review the trial judge’s, and chief judge’s, findings of fact related to a motion for disqualification for an abuse of discretion. *Cain v Dep’t of Corrections*, 451 Mich 470, 503 & n 38; 548 NW2d 210 (1996); *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

As a general rule, a judge will not be disqualified absent a showing of actual and personal bias or prejudice. MCR 2.003(B)(1); see also *Cain, supra* at 495. Here Autowhirl’s claim is based entirely on rulings it does not agree with, plus several ex parte conversations between opposing counsel and the judge. However, opposing counsel and the judge provided an explanation for those conversations that negates any suggestion of bias or impropriety, and we therefore find that it was not an abuse of discretion for either the judge or the chief judge to deny Autowhirl’s motion.

In addition, because as we have explained above, Autowhirl’s claims for specific performance and breach of contract are entirely without merit, the judge’s rulings were reasonable, not biased. Quite simply, Autowhirl had not made timely payments on its land contract with FICC, had never paid its taxes or water bills, and then insisted that Tasmania sell it the property without charging any interest. We fail to see how the court’s rulings could have been different in this case.

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello