

STATE OF MICHIGAN
COURT OF APPEALS

BAERE COMPANY,

Plaintiff/Counter-Defendant-
Appellee/Cross-Appellant,

v

ADVANTAGE 99 TD,

Defendant/Counter-Plaintiff-
Appellant/Cross-Appellee.

UNPUBLISHED
January 13, 2011

No. 292964
Kent Circuit Court
LC No. 04-012262-CH

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

PER CURIAM.

In this quiet title action, defendant appeals by right and plaintiff cross-appeals judgment entered for defendant on remand from this Court reversing the trial court's judgment entered after a bench trial. Both parties dispute the trial court's calculation of damages. We affirm in part, reverse in part, and remand for recalculation of interest.

This dispute arose in 2004 when both parties moved to quiet title to a parcel of residential property in Grand Rapids. Following a bench trial, the trial court entered a judgment quieting title in favor of plaintiff. The trial court also awarded plaintiff money damages for loss of use of the property in the amount of \$700 per month in lost rent. Defendant appealed, and this Court reversed the trial court and remanded for entry of judgment quieting title in favor of defendant. *Baere Co v Advantage 99TD*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2008 (Docket No. 268238). On remand, plaintiff moved to recover money for improvements it made to the property pursuant to MCR 3.411(F), for real estate taxes paid, for utilities, and for other maintenance costs. Defendant moved to recover damages for the loss of reasonable use of the property pursuant to MCR 3.411(E) and for interest. Defendant claimed that it was entitled to the same \$700 per month initially awarded to plaintiff. The trial court entered an opinion and judgment that provides in relevant part as follows:

[Defendant] is awarded a money judgment against [plaintiff] in the amount of \$14,036.84. This amount represents \$16,343.55 for the reasonable value of the use of the property from January 2005 through September 2008, \$5,560.94 for damages paid to Plaintiff and \$750 for the security deposit; interest in the amount

of \$3,291.13; less offsets credited to [plaintiff] in the amounts of \$4,453.58 for taxes paid, \$955.20 for special assessments paid, and \$6,500 for improvements.

Defendant contends that the trial court erred when it failed to award \$700 per month from January 2005 through September 2008 for loss of the reasonable value of use of the property. Specifically, defendant argues that the doctrines of judicial estoppel and the law of the case precluded the trial court from awarding an amount different from the \$700 per month that it had previously awarded to plaintiff. Defendant further argues that the trial court's calculation under MCR 3.411(E) violates its constitutional right to equal protection of the law.

We review a trial court's award of damages following an evidentiary hearing for clear error. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 98-99: 535 NW2d 529 (1995). "A finding 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 was made." *Id.* at 99. Under this standard, we accord deference to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. *Id.*; MCR 2.613(C). "[T]he clear error standard of review must, by definition, accommodate the possibility of multiple 'right' results, or at least 'permissible' results." *Hill v City of Warren*, 276 Mich App 299, 309; 740 NW2d 706 (2007). To the extent we are required to interpret a court rule, like a matter of statutory interpretation, our review is de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). We also review constitutional issues de novo. *Weishuhn v Catholic Diocese*, 279 Mich App 150, 155; 756 NW2d 483 (2008).

MCR 3.411(E) provides in relevant part:

(1) Within 28 days after the finding of title, the party found to have title to the premises may file a claim against the party who withheld possession of the premises for the reasonable value of the use of the premises during the period the premises were withheld....

(2) The court shall hear evidence and make findings, determining the value of the use of the premises.

(a) The findings must be based on the value of the use of the premises in their condition at the time the withholding party, or those through whom that party claims, first went into possession. The use of the buildings or improvements put on the land by the party who withheld possession may not be considered.

(b) The findings must be based on the general value of the use of the premises, not on a peculiar value the use of the premises had to the party who withheld possession or might have had to the party who had title.

In this case, the trial court found that plaintiff took possession of the property in December 2004. The trial court needed to determine the reasonable value of the use of the property in the condition it was in when plaintiff first possessed it, i.e. *before* the improvements. MCR 3.411(E)(2)(a). In order to do this, the trial court was required to hold an evidentiary hearing. MCR 3.411(E)(2). At the evidentiary hearing, plaintiff's witness Bernard Schaefer testified that similar properties in the area were available to rent for \$550 to \$675 per month.

Defendant did not present any evidence to contradict Schaefer's testimony. The trial court determined that the reasonable value of the use of the property was \$612.50 per month, which was not clearly erroneous. *Hofmann*, 211 Mich App at 98-99. Although defendant contends that the trial court was bound by its previous finding during the bench trial, the court rule required the trial court to hear evidence and determine the reasonable value of the use of the property based on the evidence presented. MCR 3.411(E)(2). The trial court did not err.

Defendant contends that the trial court erred in its reasonable use determination because plaintiff was judicially estopped from taking a position at the evidentiary hearing that was inconsistent with its position at the bench trial. We disagree. "Under the doctrine of judicial estoppel, a party that has unequivocally and successfully set forth a position in a prior proceeding is estopped from setting forth an inconsistent position in a later proceeding." *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 672; 760 NW2d 565 (2008). For the doctrine of judicial estoppel to apply, a party's claims at the prior and subsequent proceeding "must be wholly inconsistent." *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1994). Here, plaintiff's position at the evidentiary hearing on remand was not "wholly inconsistent" with its position at the bench trial, which concerned the value of the premises *after* improvements. Therefore, the doctrine of judicial estoppel did not bar plaintiff from taking the position at the evidentiary hearing that the property, without improvements, would rent for less than \$700.

Next, defendant argues that the trial court erred because the law of the case doctrine prevented the court from "reversing its position post-appeal." "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The law of the case doctrine was not applicable to the damages issue in this case because this Court did not rule as to the proper calculation of damages. See *Baere Co*, unpub op.

Next, defendant argues that the trial court's award violated the Equal Protection Clause because the trial court should have, but did not, apply the "standards and interpretation of the law" equally to both parties. "The equal protection clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Great Lakes Soc v Georgetown Charter Twp*, 281 Mich App 396, 427; 761 NW2d 371 (2008) (citation omitted). Consequently, defendant must demonstrate that it was treated differently from some similarly situated entity. *Id.* Defendant has failed to do so. Here, the parties were not similarly situated. Plaintiff introduced evidence at the evidentiary hearing to support its position, but defendant did not. The parties were not treated differently; each had the opportunity to introduce evidence on the reasonable value of use of the property. *Id.*

Next, defendant argues that the trial court erred in calculating the interest on the judgment pursuant to MCL 600.6013(8) because the court awarded interest on a pro rata basis instead of on the entire amount of the judgment. We review questions involving statutory interpretation de novo. *CAM Construction*, 465 Mich at 553.

The fundamental aim of statutory construction is to give effect to the intent of the Legislature. This Court must look at the specific statutory language and, if it is

clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written. Furthermore, a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. [*Diamond v Witherspoon*, 265 Mich App 673, 684-685; 696 NW2d 770 (2005) (citations and quotations omitted).]

The trial court awarded interest on a pro rata basis “only as the monthly amount became due.” But MCL 600.6013(8) provides in relevant part that “interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint . . . and . . . is calculated on the *entire amount* of the money judgment” (emphasis added). Because the plain language of the statute provides that defendant was entitled to recover interest calculated on the entire amount of the money judgment, the trial court erred. *Id.*

Next, defendant argues that the trial court erred when it calculated the final judgment because it twice gave plaintiff credit for paying real estate taxes on the property. We disagree. The trial court in its April 21, 2009 order stated it used the amount plaintiff paid in taxes for the years 2003-2005 (\$4,453.58) and in 2006 (\$1,615.75) to estimate the monthly expense for property taxes (\$126.44) that would have accrued during the 45-month period from January 2005 to September 2008 (\$5,689.80) while plaintiff was in possession and for which defendant was entitled an award of the value of reasonable use. The trial court did not credit plaintiff for the actual taxes it paid for the property during this period of time. After calculating the value of the reasonable use, taking into account the estimated taxes that were accruing during that period, the trial court awarded plaintiff as an offset the payments it had made for back taxes and special assessment that had accrued before January 2005. Although the trial court stated that it awarded the offset on the basis of a stipulation that defendant disputes, the offset only prevented defendant from being unjustly enriched. In sum, taxes for two different time periods were used to calculate the judgment amount. Plaintiff was not credited twice for the same taxes. The trial court did not clearly err in calculating the value of the reasonable use of the property by taking into consideration the estimated taxes that were accruing on the property while plaintiff was in possession. *Hofmann*, 211 Mich App at 98-99.

On cross-appeal, plaintiff argues that the trial court erred in entering an award of loss of use of the property under MCR 3.411(E) in favor of defendant. Plaintiff contends that defendant was not entitled to an award because the property was uninhabitable at the time that it took possession of the property. After reviewing the record, we conclude that the trial court did not clearly err when it found that the property was habitable at the time defendant took possession. *Hill*, 276 Mich App at 309; *Hofmann*, 211 Mich App at 98-99.

Next, plaintiff argues that the trial court undervalued the improvements it made on the property. We disagree.

MCR 3.114(F) provides in relevant part:

(1) Within 28 days after the finding of title, a party may file a claim against the party found to have title to the premises for the amount that the present value of the premises has been increased by the erection of buildings or the making of

improvements by the party making the claim or those through whom he or she claims.

(2) The court shall hear evidence as to the value of the buildings erected and the improvements made on the premises, and the value the premises would have if they had not been improved or built upon. The court shall determine the amount the premises would be worth at the time of the claim had the premises not been improved, and the amount the value of the premises was increased at the time of the claim by the buildings erected and improvements made.

After reviewing the record, we find that the trial court did not clearly err when it determined that plaintiff was entitled to \$6,500 for improvements. The trial court's finding was supported by the record. Although plaintiff submitted evidence that its improvements increased the property's value by \$11,000, defendant's evidence showed that the value of the home increased between \$6,000 and \$7,000. Conflicting evidence is insufficient to leave this Court "with a definite and firm conviction that a mistake was made." *Hofmann*, 211 Mich App at 99.

Alternatively, plaintiff argues that for purposes of MCR 3.411(F), the trial court should have determined the value of the property at the time the improvements were completed in 2006 because market forces since then decreased the property's value. While plaintiff's argument has some merit, it is inconsistent with the plain language of the court rule. The trial court must assess "the amount the value of the premises was increased *at the time of the claim*." MCR 3.114(F)(2) (emphasis added). Plaintiff filed a claim for recovery of the value of the improvements on October 2, 2008, and the trial court properly considered the value of the property as of that date.

We affirm in part, reverse in part, and remand for recalculation of interest. Neither party having prevailed in full, no costs are taxable under MCR 7.219. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio