

STATE OF MICHIGAN
COURT OF APPEALS

RANDIE K. GRIER,

Plaintiff-Appellant,

v

WALSH SECURITIES, INC.,

Defendant/Cross-Plaintiff-Appellee,

and

HOMECOMING FINANCIAL NETWORKS,
IDEAL MORTGAGE COMPANY, RANDY
WYLIN, MICHELE WYLIN, and JASON DAVIS,

Defendants-Appellees,

and

FIRST AMERICAN TITLE INSURANCE
COMPANY,

Defendant/Cross-Defendant-
Appellee,

and

RONALD BAER,

Defendant.

Before: Fitzgerald, P.J., and Neff and Markey, JJ.

PER CURIAM.

This is an action to recover money damages arising from defendants' alleged interference with plaintiff's claimed interest in a home located at 19713 Snowden Street in Detroit. Plaintiff

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appeals as of right from the trial court's orders, following a bench trial, holding that plaintiff had no legal interest in the property and dismissing all claims. We affirm.

Plaintiff argues that the trial court erred in finding that an April 1998 memorandum of understanding amended a January 1998 land contract, and in lifting an injunction enjoining defendant Homecoming Financial Networks from interfering with plaintiff's possessory interest in the property. We disagree.

A trial court's findings of fact are reviewed for clear error. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Regard is to be given to the trial court's special opportunity to evaluate the credibility of witnesses who appeared before it. *Morris v Clawson Tank Co*, 459 Mich 256, 271; 587 NW2d 253 (1998). A finding is clearly erroneous when, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake has been made. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410-411; 531 NW2d 168 (1995), overruled in part on other grounds *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 116-117 n 8; 595 NW2d 832 (1999). Questions of law are reviewed de novo. See *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002).

MCR 3.310(C)(4) states that an injunction "is binding only on the parties to the action, their officers, agents, servants, employees, and attorneys, and on those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise." As of May 30, 2001, Homecoming, against whom the injunction was issued, was no longer a party. The trial court never set aside the order dismissing Homecoming and, therefore, the injunction was properly lifted.

In any event, the memorandum of understanding purports to have been signed by plaintiff. Although plaintiff denied signing it, he did not present a witness in support of his claim that it was a forgery, and he was not permitted to testify that an expert allegedly told him that his signature might be forgery. The trial court found that plaintiff failed to show that the memorandum was a forgery. The court also found that the memorandum amended the January 1998, land contract, and that plaintiff failed to prove that he paid for the property in accordance with the terms of the memorandum. In light of the record, the court's findings are not clearly erroneous.

Additionally, Michigan's race-notice statute, provides:

Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. The fact that such first recorded conveyance is in the form or contains the terms of a deed of quit-claim and release shall not affect the question of good faith of such subsequent purchaser, or be of itself notice to him of any unrecorded conveyance of the same real estate or any part thereof. [MCL 565.29.]

“A good-faith purchaser is one who purchases without notice of a defect in the vendor’s title.” *Michigan Nat’l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). The holder of a negotiable instrument such as a mortgage “is under no duty to make an inquiry as to the validity of the underlying transaction if the negotiable instrument is valid on its face.” *Mox v Jordan*, 186 Mich App 42, 47; 463 NW2d 114 (1990).

In this case, it is undisputed that plaintiff did not record the January 1998 land contract until August 1999, well after Jimmie Dumas obtained his mortgage, and after the mortgage was processed by Ideal Mortgage Company, the title work was completed by First American Title Insurance Company, and the mortgage was funded by Walsh Securities, Inc. and then sold and assigned to Homecoming. Plaintiff does not challenge the trial court’s finding that there was “no evidence” that Ideal’s loan officer, Jason Davis, “intentionally misrepresented the true owner of Snowden to Walsh Securities and First American Title Company.” Because Homecoming purchased the mortgage from Walsh Securities, it was a good-faith purchaser without notice and, therefore, took title free of plaintiff’s alleged interest in the property.

Next, plaintiff argues that the trial court erred in failing to sua sponte declare a mistrial on the basis that it was informed of the results of the case evaluation. We disagree.

Plaintiff did not move for a mistrial below and, therefore, this issue is not preserved. Therefore, plaintiff must show a plain error affecting his substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000); see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Plaintiff correctly observes that the result of a case evaluation may not be revealed to the court where the case is being tried without a jury. MCR 2.403(N)(4); see also *Cranbrook Professional Bldg, LLC v Pourcho*, 256 Mich App 140, 143; 662 NW2d 94 (2003). The usual sanction for a violation of this rule is the disqualification of the trial judge and remand for a new trial before a different judge. *Id.* Here, however, there is no indication in the record that the case evaluation was ever disclosed to the trial judge. Furthermore, plaintiff alleges that the case evaluation was revealed to the court *before* he waived his right to a jury trial. In this circumstance, any violation would not warrant a new trial. *Id.* at 144-145. Therefore, plaintiff has failed to show plain error affecting his substantial rights.

Next, plaintiff argues that the trial court misled him and deprived him of a fair trial by granting summary disposition to defendants Homecoming and First American. We find no support for plaintiff’s argument and, in any event, conclude that this issue has been waived.

A trial court’s grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Allen v Keating*, 205 Mich App 560, 562; 517 NW2d 830 (1994). The parties dispute the basis for the trial court’s summary disposition order. Plaintiff contends that summary disposition was granted as a sanction for his failure to attend the hearing on the motion. Conversely, defendants Homecoming and First American maintain that summary disposition was granted based on the merits of their motions. Plaintiff has not ordered the transcript of the May 30, 2001, hearing at which the trial court granted Homecoming’s and First American’s motions for summary disposition. In response to an earlier motion to dismiss plaintiff’s appeal for failure to order all relevant transcripts, plaintiff

represented that he was not seeking relief from any orders entered at hearings for which he had not ordered the transcript, that such transcripts would be irrelevant, and that ordering them would be an unnecessary expense. Because the parties dispute the basis for the trial court's summary disposition order and because plaintiff has not ordered the transcript of the May 30, 2001, hearing at which summary disposition was granted, we conclude that this issue is waived. *Thomas v McGinnis*, 239 Mich App 636, 649; 609 NW2d 222 (2000).

In any event, plaintiff's arguments concerning the trial court's grant of summary disposition are moot because the court eventually found that plaintiff failed to prove that he had an enforceable interest in the home, inasmuch as he did not show that he paid for the home in accordance with the terms of the memorandum of understanding. Further, Homecoming was a good-faith purchaser of the mortgage and, therefore, took free of plaintiff's alleged interest in the property.

Plaintiff also argues that the trial court erred in admitting into evidence Ideal's client list, which had not been provided to plaintiff during discovery. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Here, however, plaintiff did not object to the evidence at trial, so this issue is not preserved. Accordingly, appellate relief is precluded absent plain error affecting plaintiff's substantial rights. MRE 103(d); *Kern, supra*.

Plaintiff has not shown that appellate relief is warranted. Plaintiff concedes that the trial court never entered an order preventing defendants from introducing evidence not disclosed during discovery. Further, although plaintiff contends that the trial court granted his motion to exclude all evidence not disclosed during discovery at a hearing on November 5, 2001, he has not ordered the transcript of this hearing. Accordingly, this issue is waived. *Thomas, supra*.

Plaintiff next argues that the trial court erred in denying his request to admit the deposition of Melvin Jackson into evidence.

MRE 804(b)(5) states that the hearsay rule does not exclude

[t]estimony given as a witness in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

For purposes of this subsection only, "unavailability of a witness" also includes situations in which:

(A) The witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(B) On motion and notice, such exceptional circumstances exist as to make it desirable, in the interests of justice, and with due regard to the importance

of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

The trial court denied plaintiff's request to admit Jackson's deposition because plaintiff failed to show that he exercised due diligence in attempting to produce him. But MRE 804(b)(5) does not contain a due diligence requirement. The record discloses that Jackson had moved to Arizona and, therefore, was unavailable under MRE 804(b)(5)(A). The parties did not contend that Jackson's deposition was not taken in compliance with the law, or that defendants did not have an opportunity and similar motive to develop his testimony. We therefore conclude that the trial court erred in denying plaintiff's request to admit Jackson's deposition.

Nonetheless, in order to be entitled to appellate relief, plaintiff must show that the trial court's ruling excluding Jackson's deposition affected a substantial right. MRE 103(a); MCR 2.613(A); *Campbell v Sullins*, 257 Mich App 179, 196-197; 667 NW2d 887 (2003). Plaintiff asserts that Jackson's deposition would have disputed the testimony of several witnesses and "contradicted several key facts of ownership of recording certain documents never produced at closing." But plaintiff does not identify any specific portions of the witnesses' testimony that allegedly would have been discredited, nor does he identify any specific testimony by Jackson that allegedly would have countered other evidence or testimony presented at trial. Additionally, he does not identify the alleged "several key facts of ownership" that Jackson's testimony would have contradicted. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Amb's v Kalamazoo Co Rd Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Further, a party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Thus, plaintiff has not shown that appellate relief is warranted.

Plaintiff also argues that the trial court erred in granting case evaluation sanctions and costs to the Ideal and Wylin defendants. We disagree.

Whether a party is entitled to case evaluation sanctions is a question of law to be reviewed de novo. *Marketos v American Employers Ins Co*, 465 Mich 407, 412; 633 NW2d 371 (2001). However, a trial court's determination of the *amount* of a reasonable attorney fee is reviewed for an abuse of discretion. *Haliw v Sterling Heights*, 257 Mich App 689, 694; 669 NW2d 563 (2003). Similarly, an award of taxable costs is reviewed for an abuse of discretion. *Kernen v Homestead Dev Co*, 252 Mich App 689, 691; 653 NW2d 634 (2002).

Although plaintiff contends that defense counsel stated that he would not be seeking sanctions against plaintiff, when the remark in question is considered in context, it is apparent that counsel was referring to his intent not to pursue any type of counterclaim for damages. The remark was not directed at case evaluation sanctions or costs. Additionally, counsel made a request for taxable costs at the hearing to lift the injunction, and indicated that he would be filing a motion for case evaluation sanctions.

Contrary to what plaintiff argues on appeal, the trial court made findings in support of its award of sanctions and taxable costs. The court specifically found that counsel's hourly rate of \$185 was reasonable. In evaluating the requested amounts, the court excluded all items that pertained to defendants' attempt to recover from their insurance company. It also denied

attorney fees for an unidentified attorney—DKB—whose qualifications and rates were not addressed in counsel’s affidavit. The court also denied all “miscellaneous telephone, postage & copying expenses” because they were not identified with sufficient specificity to determine whether they were incurred as a result of plaintiff’s rejection of the case evaluation. The court ultimately awarded \$22,588.50, not the \$28,630.38 amount requested, as case evaluation sanctions.

Although a court should hold an evidentiary hearing when a party challenges the reasonableness of attorney fees requested, *46th Circuit Trial Court v Crawford Co*, 261 Mich App 477, 486; 682 NW2d 519 (2004), plaintiff here never challenged defendants’ requested fees. Therefore, the issue has been forfeited.¹ *Id.* at 503.

Next, plaintiff argues that the trial court erred in dismissing the Wylins from the action. Although plaintiff argues that the trial court should have pierced the corporate veil to find the Wylins liable, plaintiff never raised this legal theory below. Therefore, the issue is not preserved.

This Court reviews a trial court’s decision on a motion for directed verdict de novo. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). Here, however, plaintiff does not address the merits of the trial court’s decisions dismissing his various claims against the Wylins. With regard to plaintiff’s newly-raised theory that the trial court should have pierced the corporate veil to impose liability on the Wylins, we note that there is no evidence that the wrongs alleged to have been committed by Ideal were the result of the Wylins’ manipulation and subversion of Ideal’s corporate entity. Thus, there is no justification for piercing the corporate veil. *Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547-548; 537 NW2d 221 (1995). Further, the trial court eventually denied all of plaintiff’s remaining claims against Ideal and Mr. Davis, thus eliminating any basis for vicarious liability against the Wylins. Therefore, this issue is without merit.

Lastly, plaintiff argues that the court reporter inaccurately transcribed his waiver of his right to a jury trial. Plaintiff offers no factual support for his claim that the transcript is inaccurate. Further, this Court previously considered this issue when it denied plaintiff’s motion to compel the court reporter to produce the original tape recordings of the trial. In any event, plaintiff does not actually argue that his waiver was invalid. See *Marshall Lasser, PC v George*, 252 Mich App 104, 107-108; 651 NW2d 158 (2002) (waiver of right to jury trial may be implied from parties’ conduct). For these reasons, we reject this claim of error.

¹ We are not persuaded by plaintiff’s unsupported claim that he did not receive defendants’ motion. Plaintiff has continuously made similar claims throughout these proceedings. Additionally, the record discloses that counsel for defendants stated on the record, in plaintiff’s presence, that a motion for case evaluation sanctions would be filed, thus clearly placing plaintiff on notice that a motion was forthcoming. Moreover, the motion was pending for nearly three months before a decision was issued, providing plaintiff ample time for following up on the status of any motion.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Jane E. Markey