

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CRAIG A. ROCHAU, TRUSTEE,

Plaintiff-Appellee,

v

HORAN, LLC,

Defendant/Third-Party Plaintiff-  
Appellant,

and

MICHAEL T. HORAN,

Defendant-Appellant,

and

DENNIS OTT and THERESA OTT,

Third-Party Defendant-Appellees.

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Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

This appeal arises out of a dispute over the sale of real property. Defendants appeal as of right an order that, in relevant part, found a quiet title action to be inappropriate for a violation of the Land Division Act, MCL 560.101 *et seq.*, found defendants to have unclean hands, and found a mortgage between defendants to be a fraudulent transaction. We affirm.

Third-party defendants Dennis and Teresa Ott owned certain property that they agreed to sell to North Shore Development of South Haven, Inc. (“North Shore”). The Otts assigned their relevant rights to plaintiff Craig A. Rochau as trustee of a trust for their benefit. The original transaction with North Shore failed, but eventually the parties agreed that North Shore would purchase the property for \$500,000. North Shore’s principals were Agnes Mackiewicz, who later declared bankruptcy and is not a party to this appeal, and James Horan. When North Shore could not obtain the necessary financing, James asked his brother, defendant Michael Horan, for assistance.

Michael Horan then formed Horan, L.L.C. and became its sole shareholder. In the name of Horan, L.L.C., Michael secured a \$420,000 loan from Fifth Third Bank. He personally loaned Horan, L.L.C. an additional \$95,000 secured by a future advance mortgage dated October 27, 2000 but not recorded until June 25, 2001. When the sale closed, the Otts were paid \$475,000 and obtained a \$25,000 promissory note for the balance due them. Michael Horan refused to guarantee the note personally and said that Horan, L.L.C. was only intended to be involved for three months, so the L.L.C. would also not pay it. Nevertheless, Horan, L.L.C. did execute the note, and James Horan and Mackiewicz personally guaranteed it.

Under the terms of the note the first payment was due April 16, 2001, and a failure to cure a default gave the Otts the right to require full immediate payment. When nobody made the first payment and nobody cured the default, plaintiff Rochau filed suit to collect on the note. That action resulted in a default judgment in the amount of the promissory note against Horan, L.L.C. The judgment remains unsatisfied.

Plaintiff later filed the instant suit against defendants, alleging that the \$95,000 mortgage between them was a fraudulent conveyance intended to subordinate and thereby dilute plaintiff's security interest for the \$25,000 debt owed to them. Defendants filed a third party suit against the Otts to quiet title, for breach of contract, and for specific performance, alleging a discrepancy between the property description agreed to be sold and the description actually conveyed.

Defendants first argue that the trial court erred in denying their motion to quiet title pursuant to the Land Division Act, MCL 560.101 *et seq.* We review summary disposition decisions de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Defendants alleged that the Otts violated the act because they withheld a portion of the land involved in the sale, which made the excluded portion inaccessible, without applying for municipal approval of a split of the realty. See MCL 560.109(1), MCL 560.109(1)(e), and MCL 560.102(j). We disagree that defendants were entitled to relief on this basis.

The Land Division Act primarily governs the relationship between property holders and public regulatory bodies. It addresses the rights and responsibilities of multiple such bodies: municipalities, MCL 560.109, county drain commissioners, MCL 560.114, conservation departments, MCL 560.116, health departments, MCL 560.118, the department of state highways, MCL 56.184, etc. Under MCL 560.267, purchasers may *void* the sale of land that was "subdivided or otherwise partitioned or split in violation of" the Land Division Act, and they may further recover damages and return of any consideration. Defendants instead seek completion of the sale with a penalty levied against the seller. Even if there was an actual violation of the statute, it allows a buyer to back out if the land was improperly divided. It is not to be invoked to manipulate a one-sided deal that would result in conveyance of the entirety of the realty at a lower price than agreed to by the parties. In any event, there is no violation. Plaintiff and the Otts intend to convey the whole property upon payment of the default judgment arising out of the promissory note, which was part of the original transaction conveying the property. Further, pursuant to the trial court's amended judgment, upon completion of the sale, plaintiff shall convey a deed that accurately describes the undivided property. Defendant's quiet title action was properly dismissed.

Defendants next argue that the trial court erred in finding their mortgage to be a fraudulent conveyance. We review the trial court's findings of fact in a bench trial for clear error

and conduct a review de novo of the court's conclusions of law. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339, 341 (2001); MCR 2.613(C). The trial court found that Michael Horan made the transfer to Horan, L.L.C. with the actual intent to hinder, delay, or defraud plaintiff and the Otts under the meaning of MCL 566.34(1)(a).<sup>1</sup> MCL 566.34(2) provides eleven nonexclusive factors that may be considered when determining intent under MCL 566.34(1)(a). The trial court found four of them present. We find no error.

The parties do not dispute that "the transfer or obligation was to an insider" under factor (a). Michael Horan was the sole member of Horan, L.L.C. and he caused the L.L.C. to enter into a deal with himself. Defendants argue that the Otts were aware of Michael's status, but do not explain why that would matter, and the trial court found to the contrary.

Defendants' brief admits that "before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit" under factor (d). The mortgage on its face is dated October 27, 2000. Plaintiff's first suit, which resulted in a default judgment for plaintiff, was filed on June 13, 2001, after Horan, L.L.C. failed to cure the April 16, 2001 default on the note. The mortgage was recorded June 25, 2001. The record contains no explanation of why defendant waited several months to record the mortgage or why defendant filed it two weeks after plaintiff commenced suit. The trial court's finding that the transfer occurred shortly after defendants were threatened with suit is reasonable.

The court also did not clearly err in finding that "the transfer was of substantially all of the debtor's assets" under factor (e). Michael Horan testified that the recording of the \$95,000 mortgage would have transferred essentially all of Horan, L.L.C.'s assets to him as an individual. Although the loan from Fifth Third Bank was larger by several hundred thousand dollars, the inquiry is only what proportion of Horan, L.L.C.'s unencumbered assets the mortgage comprised. At the time of the conveyance, the mortgage represented essentially all that Horan, L.L.C. was worth.

The court also did not clearly err in finding that "the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred" under factor (i). Michael Horan testified that Horan, L.L.C. never made a profit and that he would give it large sums of money when it was needed. It is therefore clear that the investment was losing money and only the continual subsidies of defendant kept its bills paid. Horan, L.L.C. was therefore clearly losing money and unable to pay its bills as they came due. Only the subsidies by Michael kept its bills paid. A debtor who cannot pay its bills as they come due is presumed to be insolvent. MCL 566.32(2).

MCL 566.34(2) allows a finding of a fraudulent transfer when there is only one of the listed factors present, but here the trial court reasonably found four. The court therefore did not

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<sup>1</sup> Because the court found that Horan, L.L.C. received reasonably equivalent value in exchange for the mortgage, namely \$95,000, which is not in dispute on appeal, MCL 566.34(b) is not at issue.

err in finding that the mortgage was a fraudulent transfer and ordering that it be subordinate to plaintiff's claim to the money owed on the promissory note.

Finally, defendants contend that the court erred in granting equitable relief to plaintiff but denying it to defendants under the doctrine of unclean hands. We review equitable actions de novo, but we review the trial court's findings for clear error. *McFerren v B & B Investment Group*, 253 Mich App 517, 522; 655 NW2d 779 (2002). A party seeking equity must have "clean hands," meaning equity will not aid a party who has acted in bad faith or inequitably, irrespective of the other party's improprieties. *Rose v Nat'l Auction Group*, 466 Mich 453, 462-463; 646 NW2d 455 (2002). Defendants argue that plaintiff and the Ott's have unclean hands because they refused to convey the excluded portion of the property. We disagree.

This issue only concerns the portion of the property that was omitted from the deed that the Ott's gave to defendants. Significantly, defendants explicitly conceded that the omission of part of the property was inadvertent and "simply an error," apparently due to a conflict between two surveys. In other words, plaintiffs retained title to a portion of the property by happenstance rather than by design. Plaintiffs then refused to convey that remaining portion until Horan, L.L.C. honors its obligation to pay the \$25,000 promissory note. Plaintiffs have a judgment lien against the property, but that lien is subordinate to Fifth Third's mortgage and therefore may be of little value in collecting the unpaid debt. "A court acting in equity 'looks at the whole situation and grants or withholds relief as good conscience dictates.'" *McFerren, supra* at 522 (quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951)). In consideration of defendants' wrongful financial dealings and the inadvertence of plaintiffs' retention of the excluded portion of the property, we agree with the trial court that good conscience does not require plaintiffs to convey title to the remaining portion of the property until defendants have paid their obligations.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Janet T. Neff

/s/ Alton T. Davis