

STATE OF MICHIGAN  
COURT OF APPEALS

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CADLE COMPANY II, INC.,

Plaintiff-Appellee,

v

JAMES R. WECHSLER,

Defendant-Appellant.

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UNPUBLISHED

April 7, 2009

No. 279729

Oakland Circuit Court

LC No. 2005-065950-CK

Before: Gleicher, P.J., and K. F. Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in plaintiff's favor in this action to recover on a promissory note. We reverse and remand.

This case comes before this Court for the second time. In a prior appeal, this Court determined that plaintiff had failed to establish its chain of title to the promissory note. *Cadle Co II, Inc v Wechsler*, unpublished opinion per curiam of the Court of Appeals, issued October 17, 2006 (Docket No. 269833). In this appeal, we similarly conclude that a genuine issue of material fact exists regarding if and when plaintiff acquired ownership of the note.

We review de novo a circuit court's decision on a motion for summary disposition. *Spiel v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A court properly may grant a motion for summary disposition under MCR 2.116(C)(10) if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id.* at 30-31. The nonmoving party must present more than mere allegations to establish a genuine issue of material fact requiring resolution at trial. *Id.* at 31.

As this Court previously observed, "Plaintiff commenced this collection action on defendant's December 15, 1996 promissory note for \$83,244.33 payable to Wilshire Credit Corporation [WCC]." *Cadle Co II, Inc, supra* at 1. "Plaintiff asserted that [WCC] had assigned the note to it on February 7, 2005, attaching to its complaint a copy of a purported note allonge" assigning the note to plaintiff. *Id.* at 1-2. In the course of the parties' cross-motions for summary disposition, plaintiff filed a response in which it

alleged for the first time that it had purchased the [WCC] note for a “good and valuable” consideration on April 23, 2001, and that the “allonge was signed and provided at a later date.” But plaintiff did not move to amend its complaint. In support of its new allegation, plaintiff produced a copy of a bill of sale dated April 23, 2001 that on its face purports to be between Cadlerock Joint Venture II, L.P., as grantor, conveying to plaintiff: “All those certain Loans in Wilshire Consumer Obligation Structured Trust 1995-A, as set forth in the attached Exhibit ‘A.’” To the bill of sale, plaintiff attached a single line of a computer-generated spreadsheet indicating a loan account number 02750442, a loan number of 386611, with an unpaid principal balance of 82,175.85 as of 6-14-01, and the name, “Wechsler James R.” [*Id.* at 3.]

In reversing the circuit court’s finding as a matter of law that plaintiff owned the note, this Court reasoned in relevant part as follows:

Plaintiff’s complaint, which it never sought to amend, alleged the [WCC] note had been assigned to it on February 7, 2005 by the allonge attached to the complaint. In response to defendant’s motion for summary disposition, plaintiff asserted the note was actually assigned to it on April 23, 2001. But plaintiff produced no admissible evidence that the note was transferred to it before February 7, 2005. At best, the bill of sale dated April 23, 2001 that plaintiff produced represented no more than a transfer between entities apparently controlled by Daniel C. Cadle. More important, the bill of sale and its single line computer spread sheet regarding the note account is not evidence that . . . [WCC] ever assigned the note to either the Wilshire Consumer Obligation Structured Trust 1995-A or to Cadlerock Joint Venture II, L.P.

Plaintiff also attempts to supplement the record on appeal by attaching to its brief a purported copy of the first page of a March 26, 2001 “portfolio sale agreement” between “Fog Cap, L.P., a Delaware limited partnership (“Seller”), and Cadlerock Properties Joint Venture II, L.P., an Ohio limited partnership, and Cadlerock Joint Venture II, L.P., an Ohio limited partnership (together “Purchaser”).” Plaintiff may not supplement the record on appeal with evidence that was not presented to the trial court when deciding the motions for summary disposition. But even if it were proper to consider the “portfolio sale agreement,” it also provides no evidence that [WCC] assigned the promissory note to anyone. [*Id.* at 5.]

This Court held that because “plaintiff failed to produce any admissible evidence of ownership of the note before February 7, 2005,” “we find that the record raises a question of fact as to whether plaintiff began its collection activity before perfecting its ownership of the note.” *Id.* at 6.

On remand, plaintiff similarly failed to present evidence establishing as a matter of law its chain of title to the promissory note. The parties do not dispute that WCC originally owned the note. Plaintiff attached to its amended complaint a “portfolio sale agreement,” dated March 30, 2001, that conveyed certain loans and property from Wilshire Consumer Receivables Funding Company, L.L.C., to Fog Cap, L.P. Although the portfolio sale agreement mentions WCC in the opening paragraph as a party to the agreement, the agreement specifically denotes

Wilshire Consumer Receivables Funding Company, L.L.C., as the “Seller,” and the agreement purports to convey only “Seller’s one-half interest in personal property loans, secured loans, unsecured loans, Mortgage Loans and REO property . . . .” But this agreement nowhere tends to establish or reveal that WCC ever gave Wilshire Consumer Receivables Funding Company, L.L.C., an ownership interest in the promissory note. The agreement identifies WCC only as a servicer, not a seller. While it seems possible that WCC at some point conceivably may have transferred the promissory note to Wilshire Consumer Receivables Funding Company, L.L.C., or that the portfolio agreement may have encompassed the note for reasons not readily apparent absent additional evidence, the March 30, 2001 portfolio sale agreement on its face did not transfer any ownership interest in the note to Fog Cap, L.P., because Wilshire Consumer Receivables Funding Company, L.L.C., had no demonstrated ownership interest in the note. Moreover, the April 23, 2001 “bill of sale” that documents the portfolio sale agreement between Wilshire Consumer Receivables Funding Company, L.L.C. and Fog Cap, L.P. refers to an agreement “dated . . . March 13, 2001.” Plaintiff failed to introduce any bill of sale referring to the March 30, 2001 portfolio sale agreement that it attached to the amended complaint.

Because the March 30, 2001 portfolio sale agreement did not unequivocally convey the note to Fog Cap, L.P., the subsequent transactions substantiated by plaintiff likewise failed to convey the note to the purported purchasers, given that Fog Cap, L.P., could not convey what it did not own. Even assuming the March 30, 2001 portfolio sale agreement did convey the promissory note to Fog Cap, L.P., however, the remaining evidence nevertheless generated genuine issues of material fact regarding if and when plaintiff acquired the note. For example, a March 26, 2001 portfolio sale agreement purported to convey the note from Fog Cap, L.P., to CadleRock Properties Joint Venture II, L.P. and CadleRock Joint Venture II, L.P., “together,” as the “purchaser.” This agreement, however, bears a date four days before the March 30, 2001 portfolio sale agreement that purportedly conveyed the note to Fog Cap, L.P. Although the March 26, 2001 sale agreement contains a closing date of April 6, 2001, it remains unclear from the March 30, 2001 sale agreement when the closing on that sale occurred.<sup>1</sup> If the closing did not occur before April 6, 2001, then Fog Cap, L.P., could not have conveyed to the CadleRock entities by virtue of the March 26, 2001 portfolio sale agreement assets that it did not yet possess.

Furthermore, plaintiff maintains that it acquired the note on April 23, 2001. A “bill of sale” and “loan sale agreement” bearing this date purport to document transference of the promissory note from CadleRock Joint Venture II, L.P., to plaintiff. But if the conveyance from Fog Cap, L.P. to the CadleRock entities was valid, then CadleRock Properties Joint Ventures II, L.P., still has a one-half interest in the note because plaintiff submitted no evidence showing that CadleRock Properties Joint Ventures II ever conveyed its interest in the note to plaintiff.

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<sup>1</sup> The March 30, 2001 portfolio sale agreement between Wilshire Consumer Receivables Funding Company, L.L.C. and Fog Cap, L.P. lists the closing date as “[t]he date when the Trustee transfers assets as described in Section 2.”

Moreover, even were we to conclude that the various portfolio sale agreements and bills of sale prove a valid, unbroken chain of promissory note ownership in plaintiff, this history contravenes the February 7, 2005 allonge on which plaintiff initially relied when it filed its complaint. According to this allonge, WCC conveyed the note directly to plaintiff on February 7, 2005. If the various portfolio sale agreements and bills of sale qualify as valid, however, WCC had no interest in the promissory note to convey to plaintiff on February 7, 2005.

After this Court decided the earlier appeal in this case and remanded to the circuit court, plaintiff presented three additional allonges, dated October 24, 30, and 31, 2006, respectively, which plaintiff asserts establish its chain of title to the note. The October 24, 2006 amended allonge represents a conveyance of the note from WCC to Fog Cap, L.P. The October 30, 2006 allonge purports to convey the note from Fog Cap, L.P. to CadleRock Joint Venture II, L.P., “effective as of March 26, 2001.” The October 31, 2006 allonge reflects a conveyance of the note from CadleRock Joint Venture II, L.P. to plaintiff “effective as of April 23, 2001.” These allonges do not assist plaintiff, but further strengthen our finding that a genuine issue of material fact exists. If plaintiff’s other evidence of portfolio sale agreements and bills of sale are valid, then WCC would have no interest in the promissory note to convey to Fog Cap, L.P. on October 24, 2006, as the amended allonge states. Additionally, if Fog Cap, L.P. did not acquire the note until October 24, 2006, it could not have conveyed it to CadleRock Joint Venture II, L.P., “effective as of March 26, 2001.” The October 2006 allonges also omit any reference to CadleRock Properties Joint Venture II, L.P., which according to the March 26, 2001 portfolio sale agreement, acquired an interest in the note. In summary, the October 2006 allonges further evidence the existence of a genuine issue of material fact regarding the note’s history.

The servicing agreement between WCC and “The Cadle Company” further complicates this matter. The servicing agreement, dated May 1, 2001, identifies the agreement as between WCC, as “servicer,” and “The Cadle Company,” as “owner.” If the servicing agreement encompassed the promissory note, however, then it tends to show that “The Cadle Company” rather than plaintiff owned the note. Moreover, plaintiff remarked in its June 4, 2004 letter to defendant that it owned the note, but this letter contravenes the February 7, 2005 allonge purporting to convey the note from WCC to plaintiff on that date.

We conclude that there exist genuine issues of material fact concerning if and when plaintiff obtained ownership of the promissory note. Therefore, the circuit court erred by granting plaintiff’s motion for summary disposition and entering judgment in its favor.

Defendant also maintains that the circuit court erred by denying his motion for a default judgment premised on plaintiff’s discovery violations. We review for an abuse of discretion “a trial court’s decision to grant a default judgment for discovery abuses.” *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 89; 618 NW2d 66 (2000). “An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

If a party fails to obey a discovery order, MCR 2.313(B)(2)(c) permits the circuit court to enter “an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party.” Defendant complains that a default judgment and dismissal were proper because plaintiff never provided certain requested discovery, including

documents showing how much it paid for the note. The record reveals, however, that plaintiff fully complied with defendant's interrogatories in this regard, specifically interrogatories 3 and 14 of defendant's second request for interrogatories and production of documents. The circuit court determined that plaintiff did comply in this regard in its order denying the motion for a default judgment. The record further reveals that plaintiff gave this information to defendant under a stipulated protective order. Therefore, defendant's argument that plaintiff never provided the information lacks merit.

Defendant also argues that the circuit court should have entered a default judgment and dismissal as a sanction for plaintiff's failure to produce documents regarding the payments on the note that defendant made to plaintiff and its predecessors in interest. Questions four through seven of defendant's second request for interrogatories and production of documents addressed this issue. The circuit court determined that plaintiff failed to comply with its previous order compelling discovery with respect to these questions and sanctioned plaintiff in the amount of \$660. Plaintiff eventually did produce copies of checks paid on the note and copies of business records detailing defendant's payments on the note in response to his motion for a default judgment. More importantly, defendant cannot demonstrate prejudice because he and plaintiff stipulated regarding the amount he owed on the note after the circuit court granted plaintiff summary disposition. We conclude that the circuit court's decision denying defendant's motion for a default judgment did not fall outside the principled range of outcomes.

In summary, we reverse the circuit court's order granting summary disposition for plaintiff and the resulting judgment in plaintiff's favor. Our conclusion makes it unnecessary to address defendant's remaining claims on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher  
/s/ Michael J. Kelly  
/s/ Christopher M. Murray