J.S. EVANGELISTA DEVELOPMENT, L.L.C., Plaintiff/Counter Defendant/Cross Plaintiff-Appellant,

v.

FOUNDATION CAPITAL RESOURCES, INC., Intervening Plaintiff/Counter Defendant/Cross Defendant-Appellee, and

SHEKINAH GLORY MINISTRIES, Defendant/Counter Plaintiff-Appellee.

No. 311563.

Court of Appeals of Michigan.

April 24, 2014.

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

UNPUBLISHED

PER CURIAM.

Plaintiff, J.S. Evangelista Development, L.L.C. (Evangelista), appeals as of right an order granting summary disposition in favor of intervening plaintiff, Foundation Capital Resources, Inc. (Foundation Capital), and an order denying Evangelista's motion for reconsideration in this property dispute. We affirm.

On April 12, 2007, Evangelista and Wayne Church of Christ (Wayne Church) entered into a Purchase and Sale Agreement for the sale of one acre (Parcel A) of a several acre parcel of land owned by Wayne Church. Evangelista provided a $10,000 earnest money deposit on this $20,000 purchase. There was no set date for closing the transaction; rather, the agreement provided that the closing would occur after Evangelista obtained all necessary government approvals and at a mutually agreed time and place.

On or about July 29, 2008, Wayne Church entered into negotiations with Shekinah Glory Ministries (SG Ministries) for the sale of the entire, several-acre parcel of land owned by Wayne Church and a purchase agreement between the parties resulted. The closing date was to be September 29, 2008. However, on August 7, 2008, an addendum to the purchase agreement between SG Ministries and Wayne Church was executed which provided that the "offer is contingent upon the split of a parcel of land approximately one (1) acre," leaving 3.63 acres "offered for sale in this agreement."

Thereafter, on some unknown date in August of 2008, a second addendum was executed by SG Ministries and Wayne Church which stated that the "Purchaser hereby acknowledges that Seller is party to a contract with J.S. Evangelista Development dated April 12, 2007 that pertains to a portion of the property that is the subject of the Agreement (the "Existing Contract"). Purchaser has agreed to consummate the sale contemplated in the Agreement and take the Property subject to the Existing Contract." The second addendum also stated: "Purchaser and Seller hereby agree to execute and deliver the `Assignment and Assumption Agreement' attached as Exhibit B at the Closing." Further, the second addendum stated: "The $10,000 security deposit Seller holds under the Existing Contract will be transferred to Purchaser at the Closing. Purchaser will hold the same under the terms of the Existing Contract." The second addendum also revoked the "contingency set forth in the First Addendum pertaining to splitting property."

On November 3, 2008, Wayne Church and SG Ministries allegedly entered into a written assignment and assumption of the agreement between Evangelista and Wayne Church. Evangelista's $10,000 earnest money deposit was transferred to SG Ministries.

The closing on the sale of the property from Wayne Church to SG Ministries did not occur on September 29, 2008; rather, the closing occurred on November 3, 2008, the same date that the alleged assignment was executed.

About two years later, on October 29, 2010, Evangelista filed its complaint against SG Ministries. In count I, an anticipatory breach of contract claim, Evangelista averred that SG Ministries declared its intention not to perform the purchase agreement assigned from Wayne Church with regard to Parcel A. In count II, a breach of contract claim, Evangelista averred that SG Ministries failed or refused to perform its contractual obligations owed to Evangelista. In count III, Evangelista sought attorney fees, costs, interest, and sanctions.

On November 5, 2010, Evangelista filed a notice of lis pendens with the Wayne Circuit Court regarding the lawsuit concerning the property that was subject to the April 12, 2007 purchase agreement.

On November 23, 2010, Foundation Capital filed a motion to intervene in the lawsuit, averring that it held a valid first priority mortgage interest on Parcel A. Foundation Capital argued that SG Ministries accepted a $635,500 loan from Foundation Capital on November 3, 2008, the date of the closing, and its repayment obligation was secured by a mortgage recorded on November 12, 2008. The mortgage prohibited SG Ministries from selling or encumbering any portion of the mortgaged property. By supplemental brief, Foundation Capital argued that (1) it did not have notice of any alleged interest held by Evangelista with regard to the Wayne Church property, (2) there was never a closing on any purported purchase by Evangelista of Parcel A, and (3) Evangelista never recorded any interest in property owned by Wayne Church.

On December 1, 2010, SG Ministries responded to Evangelista's motion for summary disposition, arguing that the purchase agreement between SG Ministries and Wayne Church did not include any language or addendum regarding Evangelista's alleged purchase agreement or the assignment of such agreement. Moreover, SG Ministries argued, it understood that the prior agreement between Wayne Church and Evangelista was rescinded. Further, any such contract and assignment were not provided prior to closing and were not disclosed with regard to the title work or the mortgage on the property. Therefore, SG Ministries argued that several genuine issues of material fact existed which prevented summary disposition in Evangelista's favor.

On December 3, 2010, the trial court entered an order granting Foundation Capital's motion to intervene. Thereafter, Foundation Capital filed a complaint for declaratory relief. Foundation Capital averred that it was entitled to a declaratory judgment in its favor because its mortgage had priority over any interest in the property claimed by Evangelista and any parcel split would be contrary to the terms of the mortgage.

On January 4, 2011, Evangelista filed a "cross claim" against SG Ministries and a "counterclaim" against Foundation Capital. Evangelista sought a declaratory judgment that Evangelista had a first priority interest over any interest claimed by SG Ministries and Foundation Capital, and Evangelista was entitled to specific performance.

On November 8, 2011, Foundation Capital filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that its mortgage had priority over any claim by Evangelista because it had no notice of Evangelista's purported interest and its mortgage was recorded first as required by MCL 565.29.

Following oral arguments on Foundation Capital's motion, the trial court concluded that Foundation Capital did not have actual or constructive notice of the alleged purchase agreement between Evangelista and Wayne Church regarding Parcel A. Evangelista did not record the purported agreement and the purported agreement was not referenced in the purchase agreement between Wayne Church and SG Ministries or in the related title documents. Further, the alleged sale of the subject property by Wayne church to Evangelista never closed; therefore, Wayne Church retained ownership of the property that was subsequently sold to SG Ministries and for which SG Ministries acquired a mortgage. Moreover, Foundation Capital was a subsequent purchaser under MCL 565.29, the "race-notice" statute, and recorded its interest first. Therefore, Foundation Capital held a valid first priority mortgage interest and Evangelista was not entitled to split Parcel A from the subject property. Accordingly, Foundation Capital's motion for summary disposition pursuant to MCR 2.116(C)(10) was granted and Evangelista's "counterclaim" against Foundation Capital was also dismissed. The trial court further ordered that Evangelista's notice of lis pendens be discharged.

Thereafter, the trial court entered a stipulated order dismissing Evangelista's complaint and cross claim against SG Ministries. After Evangelista's motion for reconsideration was denied, this appeal followed.[1]

Evangelista raises several arguments in support of its claim that Foundation Capital was not entitled to summary disposition, but none of the arguments have merit; therefore, we affirm.

We review de novo a decision on a motion for summary disposition. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The moving party is entitled to judgment as a matter of law where the proffered evidence, considered in the light most favorable to the opposing party, fails to establish a genuine issue regarding any material fact. *Id.* Questions of statutory interpretation are also reviewed de novo. *In re Townsend Conservatorship*, 293 Mich App 182, 186; 809 NW2d 424 (2011). We review for an abuse of discretion a trial court's denial of a motion for reconsideration. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010).

Evangelista first argues that Wayne Church could not convey Parcel A to SG Ministries because Wayne Church had no interest in the parcel after it signed the purchase agreement with Evangelista. However, as the trial court held, Wayne Church was able to convey title to the entire church property to SG Ministries, including Parcel A, because the sale of Parcel A had not closed. For that reason, Evangelista's reliance on *Richards v Tibaldi*, 272 Mich App 522, 540; 726 NW2d 770 (2006), which reiterated the principle that "the grantee from a party conveying by quitclaim deed acquires the right and title which his grantor had and no other," is misplaced. Wayne Church had title to all of the church property when it sold the property to SG Ministries and SG Ministries was entitled to mortgage all the property to which it held title, including Parcel A.

Evangelista contends that "the conveyance language [in the mortgage] had the effect of a quit claim," specifically the phrase "right, title and interest," which Evangelista asserts is commonly used to designate a quitclaim. However, Evangelista admits that no Michigan law supports that claim. MCL 565.154 describes the fundamental requirements of a valid mortgage and provides:

> A mortgage of lands that is worded in substance as follows: "A.B. mortgages and warrants to C.D., (here describe the premises) to secure the re-payment of" (here describe the indebtedness or obligations the mortgage secures) and is signed by the grantor, is a valid and enforceable mortgage to the grantee and the grantee's heirs, assigns, successors, and personal representatives with warranty from the grantor and the grantor's legal representatives, of marketable title in the grantor, free from prior incumbrances.

Notwithstanding the "right, title and interest" language, the mortgage granted to Foundation Capital conformed to the requirements of MCL 565.154 because it provided that SG Ministries "does hereby mortgage, sell, bargain, grant, pledge, warrant, convey and assign" its interest in the church property in consideration for "a loan to [SG Ministries] in the total amount of [$635,500]," and was signed by representatives of SG Ministries. The intention of the contracting parties is clear: to enter into a valid and enforceable mortgage with regard to the entire property. Thus, Evangelista's argument lacks merit.

Evangelista also argues that the race-notice statute, MCL 565.29, does not apply. First, Evangelista claims that there is no conflict between the interests of Evangelista and Foundation Capital because Foundation Capital's interest is limited to the church property less Evangelista's interest in Parcel A. However, this derivative argument relies on the erroneous reasoning that the mortgage granted to Foundation Capital was a quitclaim in disguise and, thus, this argument also lacks merit. Second, Evangelista claims that Foundation Capital lacked standing under the race-notice statute because Foundation Capital was the original purchaser and not a "subsequent" purchaser. However, according to the record evidence, Evangelista's purported interest in Parcel A arose on April 12, 2007, when Evangelista and Wayne Church executed a purchase agreement. Foundation Capital's interest arose on November 3, 2008, when the

sale of the church property closed and Foundation Capital and SG Ministries executed the mortgage. Therefore, Foundation Capital was a subsequent purchaser for the purposes of the race-notice statute.

Evangelista also argues that, even if the race-notice statute applied, Foundation Capital was not a good faith purchaser because it had actual or constructive notice of Evangelista's interest in Parcel A when the mortgage was signed. "A person takes in `good faith' if he or she takes without notice of a defect in the vendor's title." *Church & Church Inc v A-1 Carpentry*, 281 Mich App 330, 345; 766 NW2d 30 (2008), aff'd on other grounds 483 Mich 885 (2009). "Regarding actual notice, a party who knows at the time a deed is received that the grantor lacks title to the property being conveyed or has notice that the grantor may not have title cannot be a bona fide purchaser." *Richards,* 272 Mich App at 539-540. "With respect to constructive notice, it is notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not." *Id.* at 540 (internal quotations omitted).

Evangelista asserts that ordinary diligence would have disclosed Evangelista's first-priority interest, and Foundation Capital did not discover Evangelista's interest in Parcel A because it did not attend the closing and "neglected to read the closing papers." Foundation Capital responds that there were no facts justifying an inquiry into Evangelista's alleged interest, and the trial court agreed. When Foundation Capital and SG Ministries executed the mortgage, on November 3, 2008, there was no evidence that would have put Foundation Capital on notice of Evangelista's alleged interest in the church property. No such interest appeared in the chain of title and a notice of lis pendens had not been filed. See *Houseman v Gerken,* 231 Mich 253, 255; 203 NW 841 (1925); *Richards,* 272 Mich App at 540. Evangelista filed its notice of lis pendens over two years later, on November 5, 2010, and had not recorded any document with the Wayne County Register of Deeds, including the purchase agreement it signed with Wayne Church.

Evangelista also argues that Foundation Capital had constructive notice of Evangelista's interest through the title insurance company, Fidelity National Title Insurance Company (Fidelity), and through SG Ministries' attorney, because both of those parties had actual knowledge of the assignment agreement; thus, the trial court should have imputed that knowledge to Foundation Capital. Assuming Evangelista had any interest in the church property, this argument lacks merit. The record evidence indicates that Fidelity was Foundation Capital's agent, at most, concerning the issuance of the title insurance policy, and not the closing itself. "[B]ecause one is an agent for one purpose he is not an agent for all." *Sherman v Korff,* 353 Mich 387, 397; 91 NW2d 485 (1958). "Fundamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent." *Briggs Tax Serv, LLC v Detroit Pub Sch,* 485 Mich 69, 80; 780 NW2d 753 (2010). The fact that Foundation Capital hired Fidelity to perform a title search and issue a title insurance policy does not lead to the conclusion that Fidelity represented Foundation Capital as its agent at the closing. Evangelista points to no evidence that Foundation Capital reserved the right to control Fidelity at the closing, and the record suggests no such evidence. And SG Ministries' attorney's knowledge of the assignment agreement was also not attributable to Foundation Capital. The attorney's letter, dated November 3, 2008, explicitly stated that he was the "attorney for [SG Ministries], in connection with the above-captioned loan transaction." There are no indicia of control that would suggest an agency relationship between Foundation Capital and SG Ministries' attorney.

Next, Evangelista argues that the trial court should have used its equitable powers to circumvent the race-notice statute due to the "unusual circumstance[]" that Evangelista had a preexisting interest in the church property when Foundation Capital's interest arose. This doctrine, called "equitable subrogation," was used in conjunction with a since-amended[2] statute "to overcome the plain language of the [race-notice] statute only in the presence of `unusual circumstances'" such as fraud, mutual mistake, a "preexisting jumble of convoluted case law," and misconduct by another party. *CitiMortgage, Inc v Mtg Electronic Registration Sys, Inc,* 295 Mich App 72, 75; 813 NW2d 332 (2011). As this Court recognized, however, the recording statute out of which the equitable-subrogation doctrine arose was amended in 2008 to remove the "unusual circumstances" language; consequently, the line of cases[3] that iterated the equitable-subrogation doctrine are no longer controlling. *Id.* Although the doctrine was preserved under limited circumstances, none of those circumstances exist on the facts of this case. *Id.* at 76-77, 81. Therefore, the trial court did not err when it declined to exercise its equitable powers to circumvent the race-notice statute, assuming that the

statute applied. Because there was no genuine issue of any material fact regarding Foundation Capital's interest, and Evangelista's lack of interest, in the church property, summary disposition in favor of Foundation Capital was appropriate. See MCR 2.116(C)(10); *Corley*, 470 Mich at 278.

Next, Evangelista argues that the trial court erred when it denied Evangelista's motion for reconsideration because the motion was accompanied by affidavits from an accountant and a banker which demonstrated that Foundation Capital was required to make further inquiries into Evangelista's potential interest in the church property. However, the "affidavits" only repeated Evangelista's argument that Foundation Capital should have attended the closing and requested more documents. Moreover, the second "affidavit" is a letter signed, but not notarized, by a senior vice president at Comerica Bank and begins: "You recently inquired as to whether banks receive copies of Purchase Agreements as part of the loan application/underwriting process for the financing of real estate purchases." The one-paragraph letter contains no indication that the writer was given specific details about the facts of this case. As discussed above, there were no facts that necessitated further inquiry into Evangelista's purported interest in the church property. Because Evangelista's motion for reconsideration merely reiterated the arguments the trial court already rejected, palpable error was not established. See MCR 2.119(F)(3).

Finally, Evangelista argues that the trial court erred when it discharged Evangelista's notice of lis pendens at the same time it ruled on the opposing motions for summary disposition. A notice of lis pendens establishes "constructive notice to a purchaser of any real estate" that the real estate is the subject of pending litigation, and is "designed to warn persons who deal with property while it is in litigation that they are charged with notice of the rights of their vendor's antagonist." MCL 600.2701(1); *Richards*, 272 Mich App at 536. A "technically proper notice of lis pendens which meets all of the statutory requirements [can] be cancelled on equitable principles if in the discretion of a trial judge the benefits of the notice are far outweighed by the damage it causes." *Altman v City of Lansing*, 115 Mich App 495, 507; 321 NW2d 707 (1982), citing *Silberstein v Silberstein*, 252 Mich 192, 194; 233 NW 222 (1930). In this case, the trial court properly discharged the notice of lis pendens because Evangelista lacked any interest in the property affected by the notice.

Affirmed.

[1] Because Evangelista filed its claim of appeal within 21 days of the trial court's order denying its motion for reconsideration, Foundation Capital's challenge to this Court's jurisdiction is without merit.

[2] 2008 PA 357; MCL 565.25.

[3] See *Ameriquest Mtg Co v Alton*, 273 Mich App 84, 99-100; 731 NW2d 99 (2006), superseded by statute 295 Mich App 72 (2011).