by Macomb County Circuit Court
8/15/2018

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

RALPH ROBERTS REALTY, LLC,

Plaintiff/Counter-Defendant,

vs. Case No. 17-2886-CB

WILLIAM BRAUNING, and
WEB PROPERTIES, LLC, jointly and severally,

Defendants/Counter-Plaintiffs.
_____________________________________/

OPINION AND ORDER

Defendants/Counter Plaintiffs William Brauning and WEB Properties, LLC ("Defendants") moved for summary disposition under MCR 2.116(C)(7), (8) and (10) and MCR 2.116(I)(1).

I. Factual and Procedural Background

Ralph Roberts Realty ("Plaintiff") is a Michigan real estate brokerage firm that, among other things, offers services to real estate investors. Defendant William Brauning, a contractor, owns WEB Properties, LLC ("Defendants"). On behalf of Defendants, Plaintiff successfully bid at foreclosure auction for the purchase of real property located at 13870 Harvey Avenue, Warren, Michigan and on property located at 16861 May, Eastpointe, Michigan. Defendants paid a fee of $5000 per property to Plaintiff for these services. In 2012, Plaintiff filed for bankruptcy protection and reorganization under Chapter 11 of the Bankruptcy Code. In the bankruptcy proceedings, Defendant was a creditor. Defendants continue to own the two above-mentioned properties. Plaintiff filed a claim of interest on each property.

Believing that an oral acquisition agreement exists that entitles it to a 50 percent portion of equity of the properties, Plaintiff filed a complaint on August 7, 2017 alleging: Count I for breach of contract, and Count II for unjust enrichment.

Defendants filed a counter-complaint on January 12, 2018 alleging: Count I, quiet title and slander of title; Count II, fraud and misrepresentation; Count III, criminal fraud under MCL 750.218 and MCL 750.248; Count IV, frivolous lawsuit under MCL 600.2591; Count V, conversion; Count VI, innocent and negligent misrepresentation; Count VII, violation of the Michigan Consumer Protection Act MCL 445.901 et seq. and the Michigan Fair Debt Collection Practices Act; and Count VIII, fraud on the Court. Defendant filed a motion for summary disposition on January 18, 2018. Plaintiff filed a response. The Court heard oral argument and took the matter under advisement.

II. Standard of Review

When reviewing a motion under MCR 2.116(C)(7), the Court accepts all well-pleaded allegations as true and construes them most favorably to the plaintiff. *Beauregard-Bezou v Pierce,* 194 Mich App 388, 390-391; 487 NW2d 792 (1992). The Court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties. *Harrison v Director, Dep't of Corrections,* 194 Mich App 446, 449; 487 NW2d 799 (1992); MCR 2.116(C)(7); MCR 2.116(G)(5). A movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999).

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425,

426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

III. Arguments

Defendants argue that Plaintiff's claims are barred by: 1) judicial estoppel and res judicata because they were not included in the bankruptcy disclosures; 2) the statute of frauds because the purported agreement is unsigned, oral contract concerning land; 3) the statute of limitations; 4) that Plaintiff lacks standing to bring the claims; 5) there are no questions of

material fact; and 6) Plaintiff committed slander of title and violated realtor ethics rules. Defendants claim that Plaintiffs converted the property by filing a false claim of interest. Defendants also claim innocent and negligent misrepresentation based on an unsigned contract.

Plaintiff responds that that: it did disclose the case during bankruptcy proceeds, thus precluding Defendants' judicial estoppel claim; that the statute of frauds does not apply to an oral joint-venture agreement; that the statute of limitations started to run at time of Defendants' alleged breach; Plaintiff has standing, did not commit slander of title, and that questions of material fact exist that preclude summary disposition.

IV. Analysis

Res Judicata/Judicial Estoppel:

Debtor's disclosure obligations are essential to the bankruptcy process. *Spohn v Van Dyke Pub Sch*, 296 Mich App 470, 489–90; 822 NW2d 239 (2012). Courts will not permit a debtor to obtain relief from bankruptcy by representing that no claims exist and then subsequently benefit from asserting those claims. *Id.* In *Spohn,* the Court of Appeals held that a finding of judicial estoppel in the bankruptcy context requires a showing that: (1) plaintiff assumed a position contrary to the one asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position; and (3) the omission did not result from mistake or inadvertence. *Id.* at 480-81.

Applying the reasoning in *Spohn,* the Court of Appeals held that a sworn bankruptcy petition that omitted a potential lawsuit sufficiently met the "contrary position" prong; the second prong was met when the bankruptcy court confirmed the debtor's plan; the third prong was satisfied when a party knew of the factual basis of the undisclosed claims and had a motive

for concealment. *Jarrett-Cooper v Rosett*, unpublished opinion of the Court of Appeals, issued March 20, 2014 (Docket No. 312958) p 2.

Here, Defendants argue that the doctrine of judicial estoppel bars Plaintiff's breach of contract claim because Plaintiff failed to include this cause of action in its Chapter 11 bankruptcy proceedings. Specifically, Defendants aver that Plaintiff's balances in the bankruptcy schedules do not include the alleged investment agreements.

Plaintiff responds that it disclosed Defendants' investor contract in the fifth amended disclosure. See, Plaintiff's Exhibit B, C. Plaintiff attaches a fifth amended disclosure from its bankruptcy that states, "Debtors also have claims and causes of action against former investors for failure to pay [Plaintiff] its share of the profits from sold houses." Plaintiff's Exhibit B. The Disclosure further states that, "Realty also owns the right to the splits generated as a result of investors' sales of real estate. Realty estimates that there are approximately 300 properties with respect to which it is entitled to splits . . . Realty believes that the net present value of these contracts is zero. . ." Plaintiff's Exhibit B. Plaintiff also includes as its Exhibit C a document that merely lists the investor's name, an address and purchase price.

Based on the out-of-context document presented as Plaintiff's Exhibit C that merely lists property addresses and owners, Plaintiff has not shown that it fully disclosed the alleged contract to the bankruptcy court. Even if it did, however, given that Plaintiff took the position that approximately 300 contracts had a value of zero, it would be a contrary position to now assert that the value of just one of the splits exceeds $25,000. That is, in the bankruptcy proceeding, Plaintiff essentially took the position that the alleged contract at issue in this matter was worthless. Consequently, Defendants meet the *Spohn* test—specifically that Plaintiff presented a contrary position to the bankruptcy court. Further, Plaintiff's position, which the court relied

upon, also satisfies the third prong of *Spohn* because Plaintiff must have known of the contract and had a motive to not fully disclose it. Therefore, the doctrine of judicial estoppel bars Plaintiff's claims.

Statute of Frauds:

Moreover, the statute of frauds requires contracts for the sale or for an interest in land to be written and signed. MCL 566.108. Plaintiff recognizes that it does not have a signed agreement but instead seeks to enforce an alleged oral arrangement with Defendants based on a line of cases holding that the statute of frauds does not bar enforcement of pre-existing, oral joint venture agreements to share profits and losses in the purchase of real estate. See, e.g. *Price v Nellist*, 316 Mich 418, 422; 25 NW2d 512 (1947)(The "agreements to share *profits and losses* arising from the purchase and sale of real estate are not contracts for the sale or transfer of interests in land and need not be in writing."); *Koffman v Mathews*, 352 Mich 390, 399–400; 89 NW2d 756 (1958) ("The general rule is that agreements to share profits and losses arising from the purchase and sale of real estate . . . need not be in writing.")

However, Plaintiff overlooks an important distinction between those cases and the present matter. That is, in *Price,* the parties agreed to share profits and losses. Here, Plaintiff alleges only that it is entitled to profits—or "net equity." Complaint ¶14. While Plaintiff avoids using the phrase "joint venture" in its Complaint, it argues in its papers that the "oral *joint venture* agreement is not barred. . ."

The Michigan Supreme Court has held that the elements of a joint venture are: (a) an agreement indicating an intention to undertake a joint venture; (b) a joint undertaking of (c) a single project for profit; (d) a sharing of profits as well as losses; (e) contribution of skills or property by the parties; (f) community interest and control over the subject matter of the

enterprise. *Meyers v Robb*, 82 Mich App 549, 557; 267 NW2d 450 (1978) citing *Hathaway v Porter Royalty Pool, Inc*, 296 Mich 90, 295 NW 571 (1941) emphasis added.

Here, the alleged arrangement only permits Plaintiff to partake in equity from appreciation but does not hold Plaintiff responsible for potential losses. Complaint ¶14. Further, Plaintiff did not exercise any community interest or control over the property. Exhibit 1, ¶3; 10(b)(2). In order for Plaintiff to have a bona-fide pre-existing joint-venture agreement with Defendants, Plaintiff must have agreed to share losses. Otherwise, if the Court were to adopt Plaintiff's reasoning, the exception to the statute of frauds would swallow the rule. That is, a party without a signed writing relating to real property could always argue that it relies on a preceding oral arrangement—precisely the sort of cases that the statute of frauds aims to prevent. The Court reads the line of cases to which Plaintiff cites as merely articulating a narrow exception to the well-established statute of frauds principles which only applies where parties have agreed to a joint endeavor, which means their agreement includes both risks and rewards.

In the present matter, Plaintiff's alleged interest lies more clearly in the real property than in the business of a joint venture endeavor. In addition to only agreeing to reap benefits from appreciation, Plaintiff also filed a claim of interest against the property. Plaintiff alleges that the unsigned contract attached to its Complaint reflects the terms of its agreement with Defendants. That contract states that the parties agreed to permit Plaintiff to record a claim of interest to "provide notice to third parties of Realty's *interest in the Home*." Plaintiff's Complaint Exhibit 1, ¶8, emphasis added. Further, it appears that the alleged joint venture between the parties only took effect when Defendants actually acquired a specific property. *Id.* ¶B 1. Consequently, the Court is satisfied that the joint venture exception does not apply and therefore the statute of frauds bars the alleged agreement. Since the parties agree that the alleged contract is unsigned,

no question of material fact exists as to whether Plaintiff has any enforceable interest in the properties. The Court will grant summary disposition to Defendant both on the basis of the statute of frauds and judicial estoppel. Having so determined, the Court need not address Defendants' remaining arguments.

Given that the statute of frauds requires any agreement for an interest in land to be written and signed, it also follows that Plaintiff may not assert a claim for unjust enrichment as an interest in the real property. To sustain a claim of unjust enrichment, a plaintiff must establish (1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). "In other words, the law will imply a contract to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense." *Id.* The parties agree that Plaintiff received five-thousand dollars for its services. Plaintiff has not established that Defendants have been unjustly enriched at its expense. To the extent that Plaintiff asserts that its claim for unjust enrichment arises from realtor services as opposed to a joint venture, the statute of frauds also requires a written agreement for such commissions. MCL 566.132(1)(e). Therefore, Count II of Plaintiff's complaint must also be dismissed.

Defendants also seeks summary disposition concerning some of their counter-claims. In Count I, Defendants allege slander of title, which requires a showing of falsity, malice, and special damages. *B & B Inv Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Plaintiff represents that it has already discharged its claims of interest. Further, Defendants fail to present any evidence of special damages or of maliciousness. Consequently, Defendants motion for summary disposition as to Count I of the counterclaim must be denied.

Regarding conversion, Defendants cite no authority to show that filing a claim of interest on real property supports a conversion claim. Likewise, Defendants fail to submit evidence of fraudulent intent so as to establish a basis for summary disposition in their favor on Count V. Further, Defendants cite no authority supporting a private cause of action for violations of realtor ethics rules. Similarly, Defendants have not shown a private right to enforce criminal false pretense statutes. Therefore, Defendants motion for summary disposition on the Counterclaims must be denied.

V. Conclusion

For the reasons set forth above, Defendant's motion is GRANTED to the extent that it seeks summary disposition of Counts I and II of Plaintiff's Complaint. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

RICHARD L. CARETTI
Circuit Court Judge

Dated: August 13, 2018

cc: John Stevens, Attorney for Plaintiff
Victoria L. Targosz, Attorney for Defendants