STATE OF MICHIGAN

COURT OF APPEALS

CITY NATIONAL BANK, a National Banking Association, as acquirer of certain assets from THE FEDERAL DEPOSIT INSURANCE CORPORATION acting as receiver of IMPERIAL CAPITAL BANK,

Plaintiff-Appellant,

v

JACKSON 230, LLC, a Michigan limited liability company, and ROBERT M. BOHLEN, an individual,

Defendants-Appellees.

UNPUBLISHED
December 10, 2020

No. 351632
Jackson Circuit Court
LC No. 12-000157-CH

Before: BOONSTRA, P.J., and BECKERING and GADOLA, JJ.

PER CURIAM.

Plaintiff appeals by right[1] the trial court's order denying its post-judgment motion for the sale of certain African artwork (the Artwork) held by the University of Michigan Museum of Art (the Museum) and vacating its earlier seizure order concerning the Artwork. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff held a mortgage on property owned by defendant Jackson 230, LLC (Jackson); defendant Robert Bohlen (Bohlen) was a personal guarantor on the loan that was the subject of that mortgage. At some point, Jackson defaulted on its obligations and went into receivership. In 2012, as part of a settlement agreement, plaintiff and Bohlen entered into a consent judgment against Bohlen in the amount of $3,870,759.39. Over the next several years, plaintiff obtained

[1] As we will discuss later in this opinion, defendants contest this Court's jurisdiction to hear this appeal as a matter of right. For the reasons that we will describe, we disagree.

writs of nonperiodic garnishment of various depository accounts held by Bohlen, and obtained a judgment lien against Bohlen's real property.

In 2015, the Artwork was donated to the Museum; the parties dispute whether the donation was made jointly by Bohlen and his wife, Lillian Montalto (Montalto), or solely by Montalto, a non-party to the consent judgment. The donation was accompanied by a "Declaration of Gift" form containing the following sentence: "We, Robert M. Bohlen and Lillian Montalto Bohlen, living at . . ., irrevocably and unconditionally make a gift of certain tangible personal property, 'Art Object(s)', owned by us." The Declaration of Gift also stated, "We hereby represent and warrant that we own the property described above absolutely and without encumbrance and have the right to convey it." The Declaration also contained the wish that the exhibition of the Artwork be dedicated to the memory of Nancy Turner Bohlen.[2]

In March 2019, plaintiff filed an ex parte motion with the trial court, requesting that the trial court seize the Artwork for the benefit of plaintiff, alleging that the Artwork was the personal property of Bohlen that he had transferred to the Museum without consideration, that the transfer of the Artwork was a fraudulent conveyance, and that plaintiff was permitted to levy execution against the Artwork to satisfy Bohlen's debt. The trial court issued an order "seizing" the Artwork, although the Artwork was ordered to remain held by the Museum.

In July 2019, plaintiff filed a motion with the trial court for the entry of an order authorizing the sale of the Artwork. The motion alleged that Montalto had informed plaintiff that she was the sole owner of the Artwork when it was donated, but that Montalto had not executed an affidavit prepared by plaintiff to that effect. The motion also alleged that Montalto lacked standing to contest the motion and that her claim of sole ownership conflicted with the language of the Declaration of Gift.

Bohlen filed a response to plaintiff's motion, which Montalto joined. They argued that Montalto was the sole owner of the Artwork at the time of the donation, and had merely permitted Bohlen to also be listed as a donor. The response was accompanied by affidavits from both Bohlen and Montalto, attesting that Montalto was the sole owner of the Artwork at the time of donation and that Bohlen had sold all of his own artwork in 2008 to satisfy another consent judgment with a different bank.

The trial court held a hearing on plaintiff's motion. During the hearing, plaintiff argued that Montalto could not contest the motion, because she had irrevocably transferred her interest to the Museum, and further that the Museum had abandoned the Artwork by not contesting the motion. Plaintiff also argued that Montalto's assertion that she owned the Artwork was contradicted by the language of the Declaration of Gift. Plaintiff also showed the trial court a copy

[2] The trial court referred to Nancy Turner Bohlen as Bohlen's mother, as does plaintiff on appeal. However, Bohlen informs this Court in his brief on appeal that Nancy Turner Bohlen was his first wife, now deceased.

of Montalto's tax return[3] and argued that it showed that she did not receive a tax credit for the donation; however, counsel for Bohlen and Montalto argued that the tax return showed that "[under] criminal penalties Ms. Montalto said it was her art and she took the tax benefit." Counsel for Bohlen and Montalto also argued that, by plaintiff's own admission, the property belonged to the Museum, not Bohlen or Montalto, and plaintiffs were attempting an "end run" around having the transfer declared fraudulent. Plaintiff's counsel responded that the statute of limitations for voiding a transfer for fraud had not passed, and that the transfer of Bohlen's interest in the Artwork could be voided without affecting the transfer of Montalto's interest.

The trial court took plaintiff's motion under advisement. It subsequently issued written findings of fact and conclusions of law, and found that, viewed in the light most favorable to the non-moving party, the Artwork belonged solely to Montalto at the time it was conveyed to the Museum. It therefore denied plaintiff's motion and vacated the ex parte order of seizure as described. The court denied plaintiff's motion for reconsideration.

This appeal followed.

II. JURISDICTION

As a threshold issue, defendants have challenged this Court's jurisdiction over plaintiff's appeal, asserting that the trial court's order denying plaintiff's motion was not a final order from which an appeal by right could be taken. We disagree. MCR 2.621 governs post-judgment motions to enforce a money judgment. MCR 2.621(H) provides that "A final order entered in a supplementary proceeding may be appealed in the usual manner." Supplementary proceedings include post-judgment motions seeking execution on the property of a judgment debtor to satisfy a judgment. See MCL 600.6104(3); MCR 2.621(A)(2). The trial court's order disposed of all of plaintiff's claims in the supplementary proceeding to enforce the judgment, and constituted a final order appealable by right. MCR 7.202(6)(a)(i); MCR 7.203(A).

III. PROCEDURAL ISSUES

Plaintiff raises several procedural challenges to the trial court's order, specifically that the trial court erroneously applied summary disposition principles to plaintiff's motion and that Bohlen and Montalto lacked standing to challenge plaintiff's motion and were not the real parties in interest. We find these challenges to be without merit.

Plaintiff argues that the trial court erroneously applied the principles of MCR 2.116(C) to its post-judgment motion, based primarily on the trial court's use of the phrase, "Viewing the facts in a light most favorable to the non-moving party," in its findings of fact and conclusions of law. Further, plaintiff argues that the trial court compounded its error by erroneously granting judgment in favor of defendants under MCR 2.116(I)(2), instead of ordering further proceedings and discovery. We see no evidence in the record that the trial court was confused about the nature of the motion it was deciding or that it granted judgment in favor of defendants rather than merely

[3] A copy of the tax return does not appear in the record provided to this Court, and it is not clear from the hearing transcript what tax year's return was discussed.

denying plaintiff's motion. Further, although the trial court is empowered in a supplementary proceeding to compel discovery and enter other orders within its discretion, MCL 600.6104, plaintiff never requested that the trial court do any such thing. We will not fault the trial court for failing to sua sponte order discovery or further proceedings when neither was requested.

Plaintiff also argues that Bohlen and Montalto lacked standing to challenge its motion in the trial court, and would suffer no injury if the motion was granted, because neither had an ownership interest in the Artwork at the time the motion was filed, the Artwork having been donated to the Museum. Initially, with regard to Bohlen, we note that plaintiff has not provided this Court with any authority for the proposition that a plaintiff may challenge a defendant's standing to oppose a particular motion in proceedings against him, or indeed that the standing doctrine applies to defendants in this manner at all, i.e., that a defendant requires "standing to defend" himself in a case once a court has asserted personal and subject matter jurisdiction over him. It is not this Court's responsibility to unravel or elaborate on a party's arguments, or search for authority to support a party's position. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW24 388 (1959).

In any event, even if Bohlen was required to satisfy some standing requirement to oppose the motion, plaintiff's argument that he has not done so is puzzling, inasmuch as plaintiff's claimed right to seize and sell the Artwork depends on Bohlen having an ownership interest in the Artwork; indeed, plaintiff at times alludes to the notion that Bohlen had fraudulently transferred his ownership interest to the Museum in a voidable transfer. What is before us is a post-judgment motion in a case to which Bohlen was already a party that sought a determination of whether certain personalty was, or had been, his personal property. And although plaintiff argues that Bohlen would only benefit from the grant of its motion, because his debt under the money judgment would be reduced, we are not convinced that a judicial declaration that one has an ownership interest in seven hundred thousand dollars' worth of artwork might not be accompanied by negative consequences, particularly when, as was noted in the hearing, Bohlen had several other creditors that may have taken an interest in any valuable property he was deemed to own. We hold that Bohlen had sufficient interest in the matter, and there was sufficient risk that Bohlen would be detrimentally affected in a manner distinct from the general public by the grant of plaintiff's motion, to "ensure sincere and vigorous advocacy." *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010). Bohlen had standing to oppose plaintiff's motion.

Regarding Montalto, we need not analyze her standing to oppose plaintiff's motion; the parties agree that she is a non-party. We do not see that Montalto independently advanced any arguments or otherwise acted like a party to the case, other than perhaps by the fact that Bohlen's response to plaintiff's motion for sale was styled as a "joint" response. In any event, it is clear that Montalto's arguments and Bohlen's arguments are the same—any conclusion we would make regarding Montalto's standing would be irrelevant to our ultimate determination.

To the extent that plaintiff argues that neither Bohlen or Montalto are "the real party in interest" in this matter, that argument is unpersuasive. As plaintiff itself notes, the real party in interest is one who is vested with the *right of action on a given claim*. See *Blue Cross & Blue Shield of Mich v Eaton Rapids Comm Hosp*, 221 Mich App 301, 311; 561 NW2d 488 (1997); see also MCR 2.201(B). Bohlen is a defendant, defending himself in a lawsuit plaintiff filed against him; Montalto is a non-party. Neither are seeking to prosecute an action or press a claim.

IV. OWNERSHIP INTEREST

Plaintiff also argues that the trial court erred by determining that the Artwork was solely owned by Montalto at the time it was donated to the Museum. We disagree. We review for an abuse of discretion a trial court's decision on a post-judgment collection action. See *System Soft Tech, LLC v Artemis Tech, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013). We review for clear error a trial court's factual findings. MCR 2.613(C). "[F]actual findings are clearly erroneous when there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

The trial court found that the Artwork belonged solely to Montalto at the time it was donated to the Museum. This finding did not completely lack evidentiary support, nor are we left with a definite and firm conviction that the trial court made a mistake. *Id.* Although plaintiff calls Bohlen's and Montalto's affidavits "self-serving" (as affidavits generally are) they were still sworn affidavits that the trial court could properly consider as evidence. MCR 2.119(B)(1), see also *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 393; 808 NW2d 511 (2011) (stating that a sworn affidavit requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts set forth in the affidavit). Additionally, although not a part of the record provided to this Court, it appears that the trial court was shown and entertained argument regarding Montalto's tax return, and that it may have indicated that she claimed a donation credit for the Artwork. The trial court was also presented with evidence that Bohlen had sold a great deal of other African artwork in 2008 to satisfy another consent judgment with a different creditor; while not dispositive in itself, this at least raises the question of why Bohlen would take such great pains to avoid using the Artwork to satisfy the consent judgment in this case, if indeed the Artwork had belonged to him. Although plaintiff points to language in the Declaration of Gift that does suggest an ownership interest by Bohlen, that document is not a document meant to establish ownership, but rather to disclaim it—in fact, it would be reasonable for a husband to disclaim any interest he had in his wife's donated artwork, even if he believed it to be none, prior to donation, if only to assure the Museum that a future divorce or death would not impact the gift. The Declaration of Gift also was not sworn or notarized, and was not an "affidavit." On balance, and with the evidence presented to the trial court at the time of the motion, we conclude that the trial court did not clearly err in its factual finding. *Hill*, 276 Mich App at 308. Having made that finding, it was not an abuse of discretion

for the trial court to deny plaintiff's motion or to vacate its earlier seizure order. *System Soft Tech*, 301 Mich App at 650.

Affirmed.[4]

/s/ Mark T. Boonstra
/s/ Jane M. Beckering
/s/ Michael F. Gadola

[4] Because we affirm the trial court's order on the ground that it did not clearly err in its ownership determination, we do not reach the issue of whether, assuming that Bohlen did own the Artwork in full or in part at some point in time before its donation to the Museum in 2015, plaintiff could properly execute on it later. Although, in the proceedings below, plaintiff occasionally raised the issue of whether the conveyance to the Museum was fraudulent and should be voided under the uniform voidable transactions act, MCL 566.31 *et seq*., plaintiff never specified the provision of the act under which the transaction should be voided or attempted to establish the elements of a claim for relief under the act for which it had the burden of proof, see MCL 566.38(7)(b); nor did the trial court decide that issue. Nothing in this opinion should be read as addressing or determining the validity of the conveyance to the Museum, in the event that Bohlen's ownership of the artwork might be established at some point in the future.