STATE OF MICHIGAN

COURT OF APPEALS

THE ARBORS CONDOMINIUM ASSOCIATION, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED October 14, 2003
v	No. 240796 Oakland Circuit Court
VICTORIA ABDELLA, Defendant/Counterplaintiff-Appellant.	LC No. 01-031172-CH

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff, The Arbors Condominium Association ("Arbors"), a Michigan non-profit condominium corporation, brought this action against defendant, a recorded co-owner of one of plaintiff's condominium units, to collect delinquent assessments and to seek foreclosure after plaintiff recorded two liens against defendant's condominium. Defendant counterclaimed, arguing that the late fees plaintiff charged and the liens filed against the property were illegal, and that the liens clouded her title to the property. Defendant appeals as of right from an order granting Arbors summary disposition and monetary judgment, and an order granting Arbors' motion for summary disposition on defendant's counterclaim. We affirm.

I

Defendant's first issue on appeal is that the trial court erred in granting Arbors summary disposition because there was an issue of material fact regarding the amount she actually owed in delinquent condominium assessments. In support of this argument, defendant contends that Arbors wrongfully filed the first lien and, as a result, she was unable to refinance her home equity loan. Defendant argues that her inability to refinance her home equity loan caused her to default on the payment of the monthly assessment payments, ultimately leading to the filing of a second lien against her property and the instant legal proceedings. We disagree.

Arbors' motion for summary disposition was brought pursuant to MCR 2.116(C)(9) and MCR 2.116(C)(10). Although the trial court did not state the particular subrule under which it decided the summary disposition motion, it is clear that the court relied on proofs outside the pleadings in reaching its decision. Accordingly, this issue will be reviewed under MCR

2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). We review a trial court's decision to grant a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). The nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

MCL 559.165 requires each condominium unit owner to comply with the project's master deed, bylaws, and the rules and regulations found in and promulgated under the Condominium Act. The lien recorded against defendant's property on March 15, 2000, provided that through March 1, 2000, defendant owed $250.96 in unpaid assessments, "exclusive of interest, late charges, costs and attorney fees . . . ." However, the record indicates that the outstanding balance of $250.96 *included* late charges and costs. Thus, defendant correctly points out that she only owed $95 in delinquent assessments only. The determination of the outstanding balance for purposes of filing the lien was based on MCL 559.208(1), which provides, in pertinent part:

> Sums assessed to a co-owner by the association of co-owners that are unpaid *together with* interest on such sums, *collection and late charges*, advances made by the association of co-owners for taxes or other liens to protect its lien, attorney fees, and fines in accordance with the condominium documents, *constitute a lien upon the unit* or units in the project owned by the co-owner at the time of the assessment . . . . [Emphasis added.]

According to the statute, not only the unpaid assessments, but also any collection and late charges that have accrued to date, constitute a lien on the defaulting co-owner's property. Therefore, the statement in the lien providing that defendant had an outstanding balance of $250.96 was accurate. The only inaccuracy was the statement that the outstanding balance "excluded" interest, late charges and other costs.

MCL 559.208(1) does not require that a co-owner owe a certain amount in unpaid assessments before a lien on her property attaches, but rather, it provides that any unpaid assessments constitute a lien on the property. Given that it is clear from both the documentary evidence in the record and defendant's own admission that she was delinquent in her assessment payments at the time the first lien was filed, we conclude that the filing of that lien was not improper.

We find unpersuasive defendant's argument that Arbors violated its own bylaws by filing the first lien. Defendant contends that Arbors acted contrary to its own bylaws because defendant was not two months in arrears at that time. The record indicates that during its August 18, 1999, meeting, plaintiff's board of directors decided that the process of filing a lien would take place routinely after a "two month delinquency." As previously discussed, MCL 559.208(1) provides that any unpaid assessment constitutes a lien. A condo association is authorized to record the lien, which is a prerequisite to commencing foreclosure proceedings, MCL

559.308(3), as soon as a co-owner becomes delinquent in her payments. Arbors' bylaws provide that the statute prevails in the event of a conflict between the bylaws and the provisions of the condominium act. Thus, Arbors was not obligated to wait until defendant was two months delinquent before filing the lien.

Further, and contrary to defendant's claim, Arbors properly complied with is two-month delinquency rule. Defendant did not pay her monthly assessments for the months of January or February of 2000, resulting in a payment delinquency of over two months by the time the lien was placed in March. Although defendant made a $500 "under protest" payment on March 3, 2000, this payment was insufficient to satisfy the entire amount due. As the trial court concluded, Arbors' two-month delinquency rule merely provided that Arbors will commence the process of filing a lien against a co-owner's property when a co-owner has failed to fully satisfy an outstanding balance for two consecutive months. Because defendant failed to pay the outstanding balance for the months of January through March 15, 2000, Arbors properly followed its two-month delinquency rule in filing the first lien against defendant's property.

We also find without merit defendant's argument that the filing of the first lien prevented the refinancing of her home equity loan and put her in further financial difficulty. The record shows that, a few months after the first lien was filed, defendant made a $2,000 payment, satisfying her payment obligations and leaving her with a credit. In response, Arbors notified defendant that it would discharge the first lien upon receipt of the recorded lien from the Oakland County Register of Deeds. Arbors explained in a letter to defendant that it would take about seven to eight months before Arbors received the recorded lien. Arbors was careful to inform defendant that if she needed to refinance during that time, she should have the mortgage company contact Arbors' lawyer who would provide the necessary documentation for the refinancing process. On this record, defendant has presented no evidence indicating that she ever attempted to refinance her home equity loan while the first lien was in place or that any such attempt was unsuccessful because of the lien's existence. Given the above, we conclude that the granting of Arbors' motion for summary disposition in was proper.

Defendant next argues that the trial court improperly granted Arbors' motion for summary disposition on defendant's counterclaim that raised a claim of slander of title. Specifically, defendant contends that the motion should not have been granted when Arbors maliciously and wrongfully filed the first lien against the property. We disagree.

In granting the motion, the court expressly ruled that defendant failed to state any claim upon which relief could be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; the motion may not be supported with documentary evidence. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Defendant's counter-complaint consisted of all of four short sentences in which she alleged that (1) the $20 late fee charged by Arbors was a penalty and contrary to the bylaws and Michigan law; (2) Arbors improperly placed the first lien on defendant's property; (3) Arbors "failed, neglected or refused" to have the first lien removed and it took several months to do so; and (4) the first lien was an "improper cloud" of defendant's title.

As will be further discussed in this opinion, the $20 monthly late fees were not penalties and were not in violation of plaintiff's bylaws or Michigan law. Therefore, the first paragraph in the counterclaim is without merit. As to the fourth paragraph in the counterclaim, to establish slander of title, a plaintiff must show falsity, malice, and special damages in that the defendant maliciously published false statements that disparaged a plaintiff's right in property, causing special damages. *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). Special damages include litigation costs and impairment of vendibility. *Id.* at 9. A plaintiff must show that a defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990). Here, there is nothing in defendant's pleadings indicating that Arbors acted with malice in filing the lien. Defendant, therefore, failed to establish that the first lien improperly clouded her title. Thus, the court correctly concluded that defendant had failed to state a claim upon which relief could be granted and it properly granted Arbors' motion for summary disposition on the counterclaim.

II

Defendant next argues that trial court erred in upholding the late fees that Arbors imposed on her. Specifically, defendant asserts that the fees were impermissible penalties and not liquidated damages, contrary to Michigan law and public policy. We disagree.

Whether a liquidated damages provision is valid and enforceable or invalid as a penalty is a question of law which this Court reviews de novo. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 508; 579 NW2d 411 (1998), citing *Moore v St Clair Co*, 120 Mich App 335, 339; 328 NW2d 47 (1982). The courts are to sustain such provisions if the amount is "reasonable with relation to the possible injury suffered" and not "unconscionable or excessive." *Moore, supra* at 340, quoting *Curran v Williams*, 352 Mich 278, 282; 89 NW2d 602 (1958).

On June 16, 1999, Arbors' board of directors enacted a rule providing that, effective August 1, 1999, co-owners who failed to make timely maintenance payments would receive a written notice after seven days. If the payments were not made by the tenth day, a late fee of $20 would be assessed. Arbors' bylaws provide that the board of directors has the authority to enact such rules without the consent of co-owners. On October 15, 1999, Arbors began charging defendant a $20 late fee per month for her unpaid assessments. As part of the monetary judgment entered in favor of Arbors, the trial court ordered defendant to pay all of the late fees that had accrued as of the date of commencement of the proceeding in this case.

Defendant argues that Arbors should only charge a seven percent late fee, and that any damages not compensated for by such interest should be reasonably calculated according to what Arbors would have earned if it had promptly deposited the money into an interest-bearing account. We disagree. Because Arbors is a non-profit organization and is not in the business of investing money for profit, defendant's method of calculating plaintiff's damages is improper.

In order for the late fees to be liquidated damages, the damages must be uncertain and the late fees must closely approximate the damages. *E F Solomon v Dep't of State Highways & Transportation*, 131 Mich App 479, 483-484; 345 NW2d 717 (1984). The record shows that, while the amount of Arbors' damages were uncertain, the $20 per month late fee was a reasonable estimation of the damages it suffered, especially considering the inconvenience of a

late payment would cost administratively and for the steps that necessarily have to be taken to enforce the payment, such as extra bookkeeping and sending account statements and overdue bill notifications. Thus, we conclude the late fees were not penalties, but liquidated damages that were both valid and reasonable. Therefore, the trial court did not err in upholding the late fees.

We also find defendant's argument that the late fees are usurious to be without merit. The usury statute, MCL 438.31, which establishes the legal interest rate that may be charged, is not applicable to a liquidated damages clause. Interest is "a charge for the loan or forbearance of money." *Balch v Detroit Trust Co,* 312 Mich 146, 152; 20 NW2d 138 (1945). A liquidated damages clause is not a charge for the loan or forbearance of money, but rather, is a charge to cover actual expenses engendered by a breach of contract.

III

Defendant next argues that the trial court improperly awarded Arbors post-order attorney fees. Specifically, defendant asserts that Arbors' counsel had failed to provide an itemized explanation of the hours and nature of the work performed after the August 29, 2001, order was entered. Defendant also asserts that during the evidentiary hearing, the court became impatient and simply "guessed" on an appropriate amount of attorney fees to award and, as a result, defendant did not receive the evidentiary hearing to which she was entitled. We disagree.

This Court reviews the trial court's award of attorney fees for an abuse of discretion. *Joerger v Gordon Food Service, Inc,* 224 Mich App 167, 177-178; 568 NW2d 365 (1997). The Condominium Act was recently amended[1] to make the recovery of costs and attorney fees mandatory. MCL 559.206(b) provides:

> In a proceeding arising because of an alleged default by a co-owner, the association of co-owners or the co-owner, if successful, shall recover the costs of the proceeding and reasonable attorney fees, as determined by the court, to the extent the condominium documents expressly so provide.

Arbors' bylaws expressly provide that in a default proceeding, Arbors, if successful, shall be entitled to recover the costs of the proceedings and reasonable attorney fees determined by the court. In addition, in its August 29, 2001, order granting Arbors' motion for summary disposition, the trial court ordered that "[d]efendant shall be, and hereby is, obligated to pay all additional legal fees that Plaintiff Association reasonably incurs in attempting to collect the aforementioned sums and owing it throughout . . . ." Thus, under MCL 559.206(b), Arbors' bylaws, and the court's order, Arbors was entitled to recover reasonable attorney fees related to collection of judgment in the instant case.

The record indicates that on December 5, 2001, the trial court held an evidentiary hearing to determine the reasonable amount of attorney fees Arbors should be awarded. At that hearing,

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[1] This statute was amended effective January 1, 2001. The amendments to MCL 559.206(b) do not affect our analysis.

Lloyd Turner, the treasurer of plaintiff's board of directors, testified that on September 18, 2001, Arbors paid $580 in legal fees for representation related to its motion for summary disposition that was heard in August of 2001. This amount was not included in the $1,306.24 in attorney's fees awarded to Arbors in the August 29, 2001, order. There was also evidence presented that on October 11, 2001, Arbors paid an additional $362.50 in attorney fees for legal services rendered during September of 2001 in relation to the collection of the judgment in the instant case. Upon hearing the testimony and reviewing the billing statements provided by Arbors, the court held that, in addition to the $1,306.24 in attorney fees that was awarded, Arbors was entitled to an additional $942.50 ($580 plus $362.50) in attorney fees for legal services rendered in attempting to collect judgment since entry of the August 29, 2001, order, and thus, the total amount in attorney fees owed to Arbors was $2,248.74. The court found that when the total was divided by Arbors' counsel's hourly rate of $145, it equaled approximately 15 ½ hours, which the court believed was "a very reasonable fee at a very low rate," especially in light of defense counsel's admission that even he had put in more than fifteen hours of work on the instant case. From our review of the record, we conclude that the court's award of additional attorney fees was not randomly determined, but was reasonably based on testimonial and documentary evidence presented at the hearing regarding the amount Arbors had paid in legal fees since entry of the earlier order. Thus, the court did not abuse its discretion in awarding additional attorney fees. Defendant is not entitled to another evidentiary hearing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot