

STATE OF MICHIGAN
COURT OF APPEALS

OCWEN FEDERAL BANK, FSB, a foreign
banking corporation,

Plaintiff-Appellee,

v

INTERNATIONAL CHRISTIAN MUSIC
MINISTRY, INC. d/b/a LATE NIGHT PRAISE
AND WORSHIP,

Defendant-Appellant,

and

PERCY L. LEWIS,

Defendant-Appellant.

UNPUBLISHED
July 8, 2004

No. 249081
St. Clair Circuit Court
LC No. 01-003301-CH

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this mortgage case, defendants International Christian Music Ministry, Inc. and Percy Lewis appeal as of right the grant of plaintiff's motions for summary disposition under MCR 2.116(C)(7), (C)(9), and (C)(10) and MCR 3.411 (civil action to determine interests in land). Plaintiff is a bank that held a mortgage on a parcel of property. Defendants, who had business dealings with the owners of the property, sued the owners and obtained a consent judgment which the owners failed to pay. Meanwhile, the owners defaulted on their mortgage and plaintiff foreclosed. Shortly thereafter, in another county, without plaintiff's knowledge, defendants obtained an order of conveyance granting them the property. Plaintiff filed this suit to determine the interests of the parties in the property. In granting plaintiff's motion for summary disposition, the trial court declared the order of conveyance null and void and vested title in plaintiff. We reverse.

I. FACTS

In 1993, Gregory Oakwood conveyed a single-family residence located at 4050 McKinley in China Township, Michigan and appurtenant real property to "Unity Community an Organization of the International Christian Music Ministry, Inc." for \$325,000.00. "Unity

Community” was a Michigan non-profit corporation originally incorporated in 1987. The president of Unity Community was Garnell H. McAfee, Sr. In 1995 and 1996, McAfee, as president, executed a series of deeds conveying the property to himself and his wife, Marilyn McAfee, effective July 15, 1996. The same day, the McAfees mortgaged the property for \$200,000. That mortgage was assigned to plaintiff, Ocwen Federal Bank “Ocwen.”

In November, 1996, International Christian Music Ministry, Inc. “ICMM” filed a lawsuit against Unity Community d/b/a Unity Community Trust in Wayne Circuit Court. Their complaint alleged that Unity Community had breached several contracts for advertising and television commercials. ICMM sought \$512,408 in damages.

During the pendency of Unity Community’s lawsuit with ICMM, the McAfees fell behind on their mortgage payments and defaulted on their mortgage loan in 1999. Following the publication of foreclosure notices and posting of the affidavit of publication, a sheriff’s deed on mortgage sale was issued July 23, 1999 to Ocwen for the outstanding balance owed of \$276,783.94.

On June 24, 1999, ICMM filed a motion to convey real estate in its Wayne Circuit Court lawsuit against Unity Community pursuant to the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31, *et seq.* In its brief in support of this motion, ICMM alleged that Unity Community had breached the terms of a consent judgment by failing to pay ICMM \$207,000.00 by April 1, 1999. ICMM alleged that Unity Community was in violation of UFTA because it was stripping itself of assets by conveying the property to the McAfees.

Judge Kaye Tertzag of the Wayne Circuit Court then entered the requested order for conveyance of real estate on September 3, 1999. The McAfees, on behalf of Unity Community, filed a motion for reconsideration to convey real estate wherein they expressly stated that they had a mortgage on this property (apparently throughout the trial McAfee was routinely dishonest and that is why neither the attorneys nor Judge Tertzag gave credence to his claim that the property was mortgaged). Nonetheless, on April 13, 2000, Judge Tertzag entered a modified order for conveyance of real estate that conveyed the property to ICMM and Percy Lewis (ICMM’s attorney) and declared the recorded declarations of homestead and patent on the property to be void and of no effect. Defendants recorded their rights to the title on September 3, 1999.

Ocwen was never a party to the Wayne Circuit Court lawsuit and did not know of ICMM and Lewis’ interests in the property until after the mortgagor’s equity of redemption period had ended and Ocwen was attempting to recover the property. Ocwen and ICMM and Lewis attempted to negotiate a settlement, but failed.

In December, 2001, Ocwen filed suit in St. Clair Circuit Court to determine interest in the land. On January 23, 2002, Ocwen filed in Wayne Circuit Court a motion for relief from and to set aside the order of conveyance of real estate and a motion to intervene. Judge Tertzag denied both motions without prejudice, informing the parties that they should take care of the lawsuit in St. Clair County, where the property is located.

In March, 2002, ICMM and Lewis requested a change of venue from St. Clair County to Wayne County because Judge Tertzag in Wayne county had conveyed the real estate to ICMM

and Lewis in 1999. St. Clair Judge Daniel Kelly denied the motion. In February, 2003, ICMM and Lewis moved for summary disposition pursuant to MCR 2.116(C)(7) (claim barred by prior judgment). In March, 2003, Ocwen filed its motion for summary disposition and Judge Kelly heard oral arguments on both motions on April 14, 2003. ICMM and Lewis argued that Judge Tertzag had already conveyed the property to them and Judge Kelly could not stay or set aside the conveyance subject to the limitations of MCR 2.613(B). Furthermore, they argued that because the 1993 deed conveyed the property to “Unity Community, an organization of International Christian Music Ministry,” they had an interest in the property as co-tenants beginning in 1993. Ocwen argued ICMM had no interest in the property because it was entirely separate from Unity Community and that the order of Judge Tertzag was ineffective against Ocwen.

On April 30, 2003, Judge Kelly issued an opinion granting summary disposition to Ocwen and quieting title to the property in Ocwen. He determined that Unity Community was a separate entity from ICMM and the 1993 deed did not create a tenancy in common. He relied on depositions of ICMM’s president Kenneth Wilson, who testified that ICMM and Unity Community have different officers and tax identification numbers and are entirely distinct. Further, all of the funds used to purchase the property were from Unity Community and the deed to the property was returned to the address of Unity Community, not ICMM. Finally, he noted that all property taxes on the subject property were paid by the McAfees and Unity Community.

Judge Kelly also found that at the time of the Wayne County lawsuit, Ocwen was a necessary party in interest and its joinder in the action was compulsory under MCR 2.205. Thus, he concluded, the order of conveyance issued by Judge Tertzag was null and void. He vested title in fee simple absolute in Ocwen and summarily dismissed the claims of ICMM and Lewis. This appeal ensued.

II. STANDARD OF REVIEW

The issue of whether Judge Kelly properly declared an order of Judge Tertzag to be null and void involves a question of law, and we review questions of law de novo. *Sun Communities v Leroy Twp*, 241 MichApp 665, 668; 617 NW2d 42 (2000).

This Court reviews de novo a trial court's decision granting summary disposition. *Spiek v Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although the trial court did not specify which court rule it relied upon in granting summary disposition, it appears the trial court considered information outside the pleadings in its decision and concluded that there was no genuine issue of material fact (MCR 2.116(C)(10)).

This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Michigan Educational Employees Mutual Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited to the evidence which had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

III. ANALYSIS

Defendants argue that as a matter of law, the St. Clair Circuit Court did not have the authority to render an order from the Wayne Circuit Court null and void contrary to MCR 2.613(B). We agree.

Judge Tertzag issued an order of conveyance granting the property to defendants and declaring the series of conveyances resulting in the transfer of the property from Unity Community to the McAfees to be null and void. Judge Tertzag exercised this authority pursuant to a section of the Uniform Fraudulent Transfer Act, MCL 566.221, which states:

Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods or things in action, or of any rents or profits issuing therefrom, and any charge upon lands, goods or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed or defrauded, shall be void.

As both the trial court and plaintiff noted, plaintiff should have been included in the Wayne County lawsuit as soon as the property became an issue. Under MCR 2.205, plaintiff was a necessary party because it had “such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief” and thus was required to be made a party. MCR 2.205. The deed to the property upon which plaintiff held a mortgage was declared void. Nonetheless, plaintiff was never a party to the lawsuit in Wayne County.

When plaintiff moved to intervene in the lawsuit, Judge Tertzag denied the motion and stated that the issue should be resolved in St. Clair County. Plaintiffs did not appeal this decision. However, Judge Kelly could not find that plaintiff had a superior interest in the property and defendants had no interest in the property without declaring Judge Tertzag’s order invalid. MCR 2.613(B) states, in relevant part: “[a] judgment or order may be set aside or vacated, and a proceeding under a judgment or order may be stayed, *only* by the judge who entered the judgment or order, unless the judge is absent or unable to act . . .” (*emphasis added*). Dean Longhofer, Michigan Court Rules Practice (4th Ed), § 2.613.5, p 517, interpreted this rule as follows:

If a judgment or order is to be set aside, vacated or stayed, it should normally be done only by the judge who made the judgment or order, since he or she is best qualified to pass upon the matter, and since it would obviously detract from the dignity and stability of judicial action if a dissatisfied litigant could run around seeking to have it upset by other trial judges. This is the sense of MCR 2.613(B), which was derived from a former statute.

Although certainly frustrating to both parties, each of whom attempted to resolve this issue in Wayne County, the court rule is very clear that only Judge Tertzag is allowed to set aside his order of conveyance. Thus, the trial court erred when it denied defendants’ motion for summary disposition under MCR 2.116(C)(7) because plaintiffs claims in St. Clair County are barred by the prior judgment of Judge Tertzag in Wayne County.

Defendants argue that Judge Kelly had the power to set aside Judge Tertag's order pursuant to MCR 2.612(C)(f) which allows a court to relieve a party from a final judgment, order or proceeding for "any other reason justifying relief from the operation of the judgment." We disagree. MCR 2.612 specifically addresses acceptable reasons for setting aside a judgment or order, whereas MCR 2.613 provides limitations on who may set aside an error. Here, the question we are addressing is whether Judge Kelly was the appropriate judge to correct this error, not whether relief from this order should have been granted. Interpretation of court rules is subject to the same basic principles which govern statutory interpretation. *Saint George Greek Orthodox Church of Southgate, Michigan v Laupmanis Associates, P C* 204 Mich App 278, 282; 514 NW2d 516 (1994). Statutes which may appear to conflict are to be read together and reconciled, if at all possible. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 65; 214 NW2d 803 (1974). When two statutes are capable of a construction that avoids conflict, that construction should control. *Jackson v Community College v Dep't of Treasury*, 241 Mich App 673, 681; 621 NW2d 707 (2000). Only when conflict exists between two statutes should the one that is more specific to the subject matter prevail. *In re Brown*, 229 Mich App 496, 501; 582 NW2d 530 (1998). Thus, MCR 2.613 controls this issue and defendants' argument is without merit.

Our determination that the trial court erred in declaring the order of conveyance null and void renders defendants' other issues about whether the trial court made improper factual findings moot. In sum, the trial court erred in granting plaintiffs' motion for summary disposition and in declaring the order of conveyance null and void. Further, the trial court erred in denying defendants' motion for summary disposition pursuant to MCR 2.116(C)(7).

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

/s/ E. Thomas Fitzgerald

/s/ Richard A. Bandstra

/s/ Bill Schuette