

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH M. BAYAGICH and ROBIN T.  
BAYAGICH,

UNPUBLISHED  
November 8, 2011

Plaintiffs-Appellees,

v

No. 298466  
Oakland Circuit Court  
LC No. 2002-043281-AS

TOWNSHIP OF ROSE and JAMES W. JAIKINS,

Defendants,

and

RESNICK & MOSS, P.C.,

Intervening Party-Appellant.

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Before: SERVITTO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Intervening party Resnick & Moss, P.C. (“intervenor”) appeals as of right from an order authorizing plaintiffs to purchase property held in a receivership in exchange for a credit bid in the amount of the balance of a judgment amount owed by defendant James Jaikins to plaintiffs. Intervenor held an attorney’s lien against the property, but the conveyance of the property to plaintiffs left no funds available to discharge intervenor’s lien. We affirm.

I. FACTS AND PROCEEDINGS

This appeal arises from litigation that began in 2002, when plaintiffs brought an action against defendant Jaikins for claims related to plaintiffs’ purchase of a parcel of real estate, known as “parcel 2,” from Jaikins. Parcel 2 was part of a larger parcel (the “parent parcel”) that Jaikins intended to subdivide into nine lots. Plaintiffs purchased the property before Jaikins obtained land division approval from defendant Rose Township and before a tax identification number was obtained for parcel 2. Jaikins’s subsequent failure to resolve these matters led to protracted litigation. In a prior appeal, this Court affirmed the trial court’s order allowing plaintiffs to rescind the purchase agreement, and remanded the case to the trial court to determine the amount of refund, with interest, that Jaikins owed to plaintiffs. *Bayagich v Rose Twp*,

unpublished opinion per curiam of the Court of Appeals, issued May 15, 2007 (Docket No. 273642).

Jaikins did not refund the money owed to plaintiffs, presumably because of difficulties in selling the remaining lots from the parent parcel. The trial court ultimately appointed a receiver to obtain sidwell numbers for the parcels. As the case progressed, the trial court expanded the receiver's duties and authority over the parent parcel. On August 20, 2008, plaintiffs and Jaikins entered into a settlement agreement whereby plaintiffs were to receive parcel 2 and Jaikins was to pay them \$150,000, to be obtained through a mortgage on another parcel of property. Jaikins did not obtain financing and was unable to comply with the terms of the settlement agreement.

In 2009, intervenor moved to withdraw as Jaikins's counsel. The trial court granted intervenor's motion and awarded intervenor a lien in Jaikins's unsold property as compensation for Jaikins's unpaid attorney fees. The trial court subsequently permitted intervenor to intervene to protect its interest in the unsold property.

After the receiver sold parcels 1 and 9, the trial court authorized the receiver to sell parcels 2, 3, 5, 6, 7, and 8. The receiver accepted a proposal from plaintiffs in which plaintiffs would "credit bid" the balance of the judgment owed by Jaikins (\$460,000 by the receiver's calculation) in exchange for parcels 2, 3, 5, 6, 7, and 8. Intervenor opposed the transaction because there would be no remaining funds to satisfy its attorney's lien. Intervenor argued that plaintiffs and Jaikins were bound by the August 20, 2008, settlement, in which the prior judgment was set aside and plaintiffs agreed to accept \$150,000 and parcel 2 from Jaikins. The trial court approved the proposal over intervenor's objections.

## II. ANALYSIS

Intervenor first argues that plaintiffs and Jaikins were bound by the August 2008 settlement in which plaintiffs relinquished their claim to the prior judgment against Jaikins in exchange for parcel 2 and \$150,000. We review a trial court's decisions approving or disapproving the actions of a receiver for an abuse of discretion. See *Ypsilanti Twp v Kircher*, 281 Mich App 251, 275; 761 NW2d 761 (2008). Whether a contract is enforceable is an issue of law that is reviewed de novo by this Court. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 721; 706 NW2d 426 (2005).

A contract for the settlement of pending litigation will be enforced if it fulfills the requirements of contract principles and satisfies the requirements of MCR 2.507(G). *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 456; 733 NW2d 766 (2006). MCR 2.507(G) provides that "[a]n agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless evidence of the agreement is in writing . . . ." The record discloses that plaintiffs and Jaikins stated their acceptance of the settlement agreement in open court in accordance with MCR 2.507(G). We agree with plaintiffs, however, that intervenor lacks standing to enforce the settlement agreement.

Intervenor was not a party to the settlement agreement. A nonparty to a contract may sue for breach of the contract only if it is an intended third-party beneficiary of the contract. MCL

600.1405; *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 427; 670 NW2d 651 (2003). Incidental beneficiaries do not have standing to sue for breach of contract. *Id.* Here, plaintiffs and Jaikins entered into the settlement agreement before intervenor became a party to the proceedings. Therefore, they could not have intended for intervenor to benefit from the agreement. Moreover, there is no indication that plaintiffs and Jaikins had any interest in securing intervenor's entitlement to payment of attorney fees at the time they entered into the agreement. Accordingly, intervenor has no standing to enforce the agreement.

Moreover, parties to a contract are free to waive or modify the original terms of their contract. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). Accordingly, plaintiffs and Jaikins were free to modify or abandon their settlement agreement, including their agreement to set aside the original judgment.

Intervenor also argues that plaintiffs are judicially estopped from rescinding the settlement agreement. Judicial estoppel "allows courts to bar parties who have prevailed on a position in one proceeding from asserting wholly inconsistent positions in subsequent proceedings." *Wolverine Power Supply Coop, Inc v Dep't of Environmental Quality*, 285 Mich App 548, 567; 777 NW2d 1 (2009). Judicial estoppel is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice," and is "not meant to be a technical defense for litigants seeking to derail potentially meritorious claims." *Opland v Kiesgan*, 234 Mich App 352, 364; 594 NW2d 505 (1999) (internal quotations and citations omitted). "[T]he purpose of the doctrine of judicial estoppel is to protect the judicial integrity of the courts rather than the rights of parties." *Id.* at 363 n 8. Here, plaintiffs did not "prevail" on a legal or factual position by agreeing to the terms of the August 2008 settlement agreement. Although intervenor is aggrieved by the failure of the settlement to resolve the issues, the integrity of the judicial system is not impaired by the parties' decision to rescind the failed settlement agreement. Accordingly, judicial estoppel does not require that plaintiffs be required to comply with the terms of the failed settlement.

Finally, intervenor argues that the trial court denied it due process by approving the receiver's transaction without conducting an evidentiary hearing.

The federal and state constitutions guarantee the right of due process. US Const Am XIV; 1963 Const art 9, § 17. "Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.'" *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Lassiter v Dep't of Social Servs*, 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Under *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), three factors are generally considered to determine what due process requires in a particular case:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

“Due process is a flexible concept, the essence of which requires fundamental fairness.” *Al-Maliki v LaGrant*, 286 Mich App 483, 485; 781 NW2d 853 (2009). In a civil case, the basic requirements of due process include notice of the proceeding and a meaningful opportunity to be heard. *Id.* “[T]he analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected.” *Brock*, 442 Mich at 111. In civil cases, due process generally requires notice of the nature of the proceedings, a meaningful time and manner to be heard, and an impartial decision maker. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The opportunity to be heard does not require a full trial-like proceeding. *Id.* However, it does require a hearing such that a party has the chance to learn and respond to the evidence. *Id.*

Intervenor argues that due process required an evidentiary hearing to determine the priorities of all liens. It is not disputed that plaintiffs recorded their judgment lien before intervenor recorded its lien. Michigan is a recording priority jurisdiction, where a duly recorded interest in property is deemed to provide notice to all subsequent lienholders that their interest is subject to the earlier recorded lien. See *Mitchell v Trustees of United States Mut Real Estate Investment Trust*, 144 Mich App 302, 314; 375 NW2d 424 (1985); *Barnard v Campau*, 29 Mich 162 (1874). Intervenor has not cited any legal theory by which its lien could take priority over plaintiffs’ earlier-recorded judgment lien. Indeed, intervenor’s counsel conceded at a hearing on June 2, 2010, that its lien was subordinate. Under these circumstances, intervenor’s right to due process did not require an evidentiary hearing to resolve an issue that had already been resolved as a matter of law.

Intervenor also argues that the trial court should have held an evidentiary hearing to determine whether plaintiffs and Jaikins colluded to allow Jaikins to retain possession of parcel 5 in exchange for plaintiffs using its credit bid to purchase all six remaining parcels. Intervenor’s only bases for suggesting possible collusion were its mere suspicion that the parties had an ulterior motive to suddenly resolve acrimonious litigation, and the parties’ alleged past attempt to propose Jaikins’s daughter as the purchaser in an arrangement that would enable Jaikins to retain possession of parcel 5. Intervenor did not offer any supporting evidence for its suspicions, such as an appraisal of the parcels’ fair market value, to establish specific grounds for suspected collusion requiring the trial court to hold an evidentiary hearing and make findings of fact. Under the circumstances, allowing intervenor to present its arguments opposing the transaction was sufficient to protect intervenor’s rights in a subordinate lien on property whose fair market value and marketability had declined over the course of the proceedings.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens