

STATE OF MICHIGAN
COURT OF APPEALS

ESTATE BUILDERS, INC., FRANK
BRONZETTI, and ESTATE BUILDERS
DEVELOPMENT COMPANY d/b/a ESTATE
DEVELOPMENT COMPANY,

Plaintiffs/Counter Defendants-
Appellees,

v

JACK KAHRNOFF and RAYMOND M.
KAHRNOFF LIVING TRUST a/k/a RAYMOND
M. KAHRNOFF REVOCABLE LIVING TRUST,

Defendants/Counter Plaintiffs-
Appellants,

and

JOHN DOE and JANE DOE,

Defendants.

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

PER CURIAM.

Defendant, Jack Kahrnoff, appeals as of right from a judgment in favor of plaintiffs as to Counts II, VI, and VII of plaintiffs' amended complaint in this declaratory judgment action.¹ We affirm.

From the record evidence, it appears that Raymond Kahrnoff, defendant's father, was in a construction business with plaintiff, Frank Bronzetti, and they created two business entities, co-plaintiffs Estate Builders, Inc. and Estate Builders Development Company. To finance various construction projects, Raymond and plaintiff Bronzetti entered into binding contracts with at

¹ We refer to "defendant" in the singular, consistent with defendant's brief on appeal.

UNPUBLISHED
November 22, 2011

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least three financial institutions. Before his death, Raymond placed his assets in the Raymond Kahrnoff Revocable Living Trust (Trust) and defendant was named the successor trustee of the Trust. At the time of Raymond's death, outstanding financial obligations on at least three contracts existed.

By their first amended complaint, plaintiffs filed a declaratory judgment action against defendant and the Trust, seeking, in relevant part, a declaration that the Trust would be liable for certain outstanding contractual financial obligations, if necessary, just as Raymond would have been as a co-obligor and co-guarantor if he had not died. Count II of plaintiffs' complaint pertained to a Comerica Bank Master Revolving Demand Note in the amount of \$300,000, Count VI pertained to an Unlimited Continuing Guaranty with Macomb Community Bank in the amount of \$1,730,000, and Count VII pertained to an Unconditional and Continuing Guaranty and Indemnity Agreement with Ohio Savings Bank in the amount of \$1,912,500.

Defendant eventually filed a motion for summary disposition, arguing in relevant part that Counts II, VI, and VII of plaintiffs' amended complaint should be dismissed, pursuant to MCR 2.116(C)(8), generally because (1) plaintiffs failed to join necessary parties—the creditors, (2) plaintiffs were not proper parties in interest and could not pursue claims on behalf of the purported creditors, and (3) the action was not ripe because defaults had not been declared by the creditors. The circuit court denied the motion for summary disposition, holding that the necessary parties were joined, plaintiffs were real parties in interest because they would be personally liable under the contracts at issue, and a declaratory judgment action is appropriate even if actual losses had not yet occurred, thus, an actual controversy existed.

Subsequently, a bench trial was conducted. In his post-trial brief, defendant argued that the circuit court lacked subject-matter jurisdiction over this case asserting claims arising out of the administration of the Trust and relating to debts of alleged creditors which were not named parties to this action. Defendant argued that the probate court had exclusive jurisdiction over such matters. By order entered October 1, 2009, the circuit court agreed with defendant, holding that whether the Trust was liable under the contracts at issue was a question arising in the administration of a trust; therefore, the matter was within the exclusive jurisdiction of the probate court and the case was dismissed.

Plaintiff moved for a new trial and/or amendment of the court's October 1, 2009 opinion and order. Plaintiffs argued that, under MCL 700.1303(1)(i), the probate court had concurrent jurisdiction with the circuit court, not exclusive jurisdiction over this matter. Thus, plaintiffs asserted that the circuit court had subject-matter jurisdiction and the declaratory judgment action should be decided. Defendant responded that "Plaintiffs' cause of action represents proceedings that concern the administration and distribution of a trust, the declaration of rights that involve the trust, a trustee and trust beneficiary, and the appointment of a successor trustee as a result they are properly under the exclusive jurisdiction of the probate court. MCL 700.1302(b)(v)." Thus, defendant argued, the trial court properly declared that it did not have subject-matter jurisdiction over this action and dismissal was proper.

On March 17, 2010, the circuit court issued its opinion and order, holding that the probate court had exclusive jurisdiction over this matter that involved the determination of questions that arise in the administration or distribution of the Trust. See MCL 700.1302(b)(v). Thus,

plaintiffs' motion was denied. Plaintiffs moved for reconsideration, arguing that the circuit court had concurrent jurisdiction over this action pursuant to MCL 700.1303(1)(i). On April 5, 2010, the circuit court issued an order reversing itself on the issue of subject-matter jurisdiction, holding that it did have concurrent jurisdiction as to those counts asserting liability against the trust, including Counts II, VI, and VII.

In their supplemental brief that followed, plaintiffs argued that they sought a declaratory judgment holding that the Trust was liable for the contractual obligations of its settlor, Raymond, if plaintiffs were liable on those obligations. That is, Raymond would be personally liable as a co-obligor and co-guarantor of the contractual obligations; thus, the Trust is also liable for Raymond's proportional share if plaintiffs were required to satisfy those financial obligations. Plaintiffs were not seeking a money judgment, merely a declaratory ruling in equity establishing the rights and obligations of the parties because, if plaintiffs waited to seek contribution until actions were taken against them by the creditors, the Trust would argue that any such claim was untimely.

On August 17, 2010, the circuit court issued its opinion and order regarding plaintiffs' declaratory judgment action. The court held that plaintiffs were entitled to prevail on Counts II, VI, and VII of their amended complaint against the Trust. Thus, the court ordered that the Trust was liable for Raymond's (1) one-half share of the obligations as set forth in Count II, (2) equitable share of the obligations as set forth in Count VI, and (3) equitable share of the 30 percent guaranty as set forth in Count VII of plaintiffs' amended complaint. This appeal followed.

First, defendant argues that the circuit court erred in concluding that it had concurrent jurisdiction over this matter because the probate court has exclusive jurisdiction over claims arising out of the administration and distribution of a trust pursuant to MCL 700.1302(b). After de novo review of this challenge to the circuit court's subject-matter jurisdiction, a question of law, we disagree. See *Adams v Adams*, 276 Mich App 704, 708-709; 742 NW2d 399 (2007).

MCL 700.7203 of the Michigan Trust Code provides:

- (1) The [probate] court has exclusive jurisdiction of proceedings in this state brought by a trustee or beneficiary that concern the administration of a trust as provided in section 1302(b) and (d).
- (2) The [probate] court has concurrent jurisdiction with other courts of this state of other proceedings that involve a trust as provided in section 1303.

MCL 700.1302(b) and (d) describe the proceedings in which a probate court has exclusive legal and equitable jurisdiction. MCL 700.1303 describes the proceedings in which a probate court has concurrent legal and equitable jurisdiction, including to "[h]ear and decide a contract proceeding or action by or against an estate, trust, or ward." MCL 700.1303(1)(i).

In this case, the proceeding was neither brought by a trustee nor a beneficiary; therefore, by the plain language of MCL 700.7203(1), MCL 700.1302 does not apply. Rather, MCL 700.1303 applies. This is a contract proceeding against the Trust, through its successor trustee, regarding three contracts that the settlor, Raymond, entered into as a co-obligor and co-guarantor

before his death and was brought by plaintiffs for the purpose of securing a declaration that the Trust would be bound and liable on those contracts. The lawsuit does not challenge the “administration and distribution” of the Trust as defendant contends. It is undisputed that plaintiffs were not beneficiaries of the Trust. The declaratory action merely sought a determination of the contractual rights and obligations of the parties—including the deceased, Raymond—with regard to the outstanding contracts to which they were co-obligors and co-guarantors. Accordingly, we affirm the circuit court’s conclusion that it had subject-matter jurisdiction over this declaratory action.

And to the extent that defendant is arguing that the circuit court order must be reversed because no claim of contribution has been made by plaintiffs, we disagree. Pursuant to MCR 2.605(A)(1), a court may “declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” Moreover, under MCR 2.605(F), “[f]urther necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.”

Next, defendant argues that plaintiffs lacked standing to pursue this declaratory judgment action because the creditors set forth on the contracts at issue were not named parties to this action. We disagree. Whether a party has standing is reviewed de novo as a question of law. *In re KH*, 469 Mich 621, 627-628; 677 NW2d 800 (2004).

“[W]henver a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment.” *Lansing Sch Educ Ass’n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010). MCR 2.605(A)(1) provides: “In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.” An “actual controversy” exists where declaratory relief is needed to guide a plaintiff’s future conduct in order to preserve the plaintiff’s legal rights. *Citizens for Common Sense in Gov’t v Attorney General*, 243 Mich App 43, 55; 620 NW2d 546 (2000). Actual injuries or losses need not have already occurred. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). But the plaintiff must “plead and prove facts which indicate an adverse interest necessitating the sharpening of the issues raised.” *Id.* at 589. As this Court explained in *Skiera v Nat Indem Co*, 165 Mich App 184, 189; 418 NW2d 424 (1987), the purpose of the declaratory judgment rule is:

to enable parties, in appropriate circumstances of actual controversy, to obtain an adjudication of their rights before actual injury occurs, to settle matters before they ripen into violations of law or a breach of contractual duty, to avoid multiplicity of actions by affording a remedy for declaring in one expedient action the rights and obligation of all litigants, or to avoid the strictures associated with obtaining coercive relief, when coercive relief is neither desired nor necessary to resolve the matter. [*Id.* (citation omitted).]

Here, defendant argues that plaintiffs were not entitled to declaratory relief because the creditors on the three contracts at issue were not parties to the litigation. That is, defendant argued, plaintiffs “do not have standing to seek collection of the amounts they claim are due

based on an alleged breach of contract.” However, that is not what plaintiffs were seeking; rather, plaintiffs were seeking a declaration that Raymond, through his Trust, remained bound and liable for his proportionate share of the obligations he assumed as a co-obligor and co-guarantor on three contracts. Clearly, plaintiffs were not seeking to enforce the debts on behalf of the creditors. According to the contracts, the creditors were at liberty to seek to collect from *either* plaintiff Bronzetti or Raymond—they were not required to proceed against both of them. Thus, plaintiff Bronzetti, not the creditors, had a significant adverse interest to ensure that he, alone, would not be held liable for the debts they both assumed.

Specifically, in brief, with regard to Count II of plaintiffs’ amended complaint, the Comerica Bank Revolving Note provides in its opening paragraph as follows: “For Value Received, the undersigned promise(s) to pay ON DEMAND to the order of Comerica Bank” a sum certain. The Note also provides: “The undersigned acknowledge(s) that this Note matures upon issuance, and that the Bank, at any time, without notice, and without reason, may demand that this Note be immediately paid in full.” Both plaintiff Bronzetti and Raymond executed this note. Similarly, with regard to Count VI, the Unlimited Continuing Guaranty with Macomb Community Bank provides, in part, that “If Borrower does not pay then any Guarantor may be required to do so.” Further, “all persons having executed the Guaranty acknowledge that their obligation hereunder shall be joint and several” and that the Bank could “proceed, in its sole and absolute discretion, against each or any of them” Plaintiff Bronzetti and Raymond both executed the contract as guarantors. And with regard to Count VII, an Unconditional and Continuing Guaranty and Indemnity Agreement with Ohio Savings Bank provides, in part, that in the event of a default, “the Lender may proceed first and directly against any one or more of the Guarantors without proceeding first or concurrently against the Borrower or any other Guarantor” Plaintiff Bronzetti and Raymond both executed the document as guarantors of “30% of the Borrower’s obligations to Bank with respect to the loan.”

Defendant fails to address the fact that Raymond entered into these contracts with plaintiff Bronzetti as a co-obligor and co-guarantor of these obligations. Who is liable if and when these creditors invoke their contractual rights to repayment? According to plaintiffs’ appeal brief, plaintiff Bronzetti is being garnished pursuant to a Comerica Bank deficiency judgment already entered against him. As defendant acknowledged in his brief on appeal, the time period to assert claims against the Trust is very limited in duration. See MCL 700.7610. The creditors on the contracts could not pursue claims against the Trust because the time period has expired. Thus, the entire financial burden of repayment would fall on plaintiff Bronzetti, who also could not file a claim against the Trust for contribution because of these same time limitations. Clearly, plaintiffs were required to preserve their legal rights by filing this timely declaratory judgment action even if actual losses had not already occurred. And, plaintiffs had a substantial interest that would be detrimentally impacted in a manner different than others. See *Lansing Sch Educ Ass’n, MEA/NEA*, 487 Mich at 372. That is, plaintiff Bronzetti, at least, would have a legal right to seek contribution for Raymond’s proportionate share of the debts to which he is liable as a co-obligor and co-guarantor. Thus, contrary to defendant’s argument, it was plaintiffs who sought to be recognized as creditors in the event that the lenders set forth in the contracts sought repayment of the financial obligations Raymond assumed before Raymond’s death. And, as defendant argues in his appeal brief, “[e]ven if a creditor’s claim is not yet due, is contingent, or is unliquidated, the creditor is nonetheless required to timely file the claim with

the trustee.” See MCL 700.7609(1)(a). Accordingly, defendant’s argument that plaintiffs lacked standing is without merit.

Next, defendant argues that declaratory relief is not available on claims that are not ripe for adjudication; thus, the circuit court erred by granting plaintiffs’ request for a declaratory judgment. After de novo review of the circuit court’s decision to grant declaratory relief, we disagree. See *Toll Northville Ltd v Northville Twp*, 480 Mich 6, 10; 743 NW2d 902 (2008).

Defendant argues that, because plaintiffs’ claim rests upon contingent future events that may never occur, i.e., the lenders may not seek repayment against the signatories on the obligations, plaintiffs’ declaratory judgment action should have been dismissed. However, as discussed above, the requirements of the declaratory judgment rule were met and its purpose furthered. This action was necessary to preserve plaintiffs’ legal and equitable rights to seek contribution against co-obligor and co-guarantor Raymond, through his Trust, considering the time limits imposed by the Michigan Trust Code to assert such claims. See MCL 700.7610. And, according to plaintiffs’ brief on appeal, Comerica Bank has already sought repayment, had a judgment entered against plaintiff Bronzetti, and plaintiff Bronzetti is subject to garnishment.

In summary, defendant’s arguments are without merit. The circuit court properly exercised subject-matter jurisdiction over this declaratory judgment action and a declaratory judgment was properly entered.

Affirmed. Cost to plaintiffs as the prevailing parties. See MCR 7.219(A).

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