STATE OF MICHIGAN

COURT OF APPEALS

GENERAL ELECTRIC CAPITAL CORPORATION,

Plaintiff/Third-Party Plaintiff-Appellant,

and

WELLS VENTURE CORPORATION,

Plaintiff/Intervening Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellant,

v

GTR GLACIER GOLF, L.L.C.,

Defendant/Cross-Defendant,

and

GTR BUILDERS, INC.,

Defendant,

and

R.J. GOLF MANAGEMENT, L.L.C., ROBERT VARGO, and JAMES GALL,

Third-Party Defendants-Appellees.

UNPUBLISHED
February 4, 2014

No. 308228
Macomb Circuit Court
LC No. 2009-003578-CK

Before: MURPHY, C.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Wells Venture Corporation (Wells Venture) appeals as of right the trial court's order, entered after a bench trial, rejecting its claim for conversion against R.J. Golf Management,

L.L.C. (RJ Golf), and Robert Vargo. In addition to challenging the court's ruling on the conversion claim, Wells Venture appeals the trial court's earlier order denying its motion for summary disposition and granting summary disposition in favor of RJ Golf, Vargo, and James Gall (collectively "the RJ Golf defendants") on Wells Venture's claims for breach of contract and tortious interference with a contract. We affirm.

I. BACKGROUND

In 2005, Wells Venture sold a golf course located in Washington Township, Michigan, to GTR Glacier Golf, L.L.C. (GTR Glacier), on a land contract. In 2006, GTR Glacier and GTR Builders, Inc., entered into a lease as co-lessees with lessor General Electric Capital Corporation (GE Capital) for a Toro lawn sprinkler system for the golf course. In January 2009, a purchase agreement for the golf course was executed, with GTR Glacier as seller and Gall-Vargo Properties, L.L.C., and JR Assets, L.L.C., as purchasers; Vargo and Gall held interests in the purchasing entities and executed the purchase agreement on their behalf. A closing on the purchase never came to fruition. Shortly thereafter, also in January 2009, GTR Glacier entered into a management agreement with RJ Golf to operate its business from January 2009 through November 2009 (the "Management Agreement"). Vargo and Gall executed the Management Agreement as managers of RJ Golf. The Management Agreement called for RJ Golf to make payments on behalf and for the benefit of GTR Glacier to cover certain expenses and costs associated with operating the business, but it did not transfer or assign GTR Glacier's liability on existing contractual obligations. The Management Agreement gave RJ Golf ten percent of the golf course's gross sales as consideration.

This action was originally filed by GE Capital after GTR Glacier failed to make payments due under the sprinkler lease. Wells Venture later joined the action, adding its own claims stemming from GTR Glacier's default under the land contract. GE Capital then assigned its claims to Wells Venture, leaving Wells Venture as the only participating party plaintiff.

At issue in this appeal are Wells Venture's claims for breach of contract, tortious interference with a contract, and conversion against the RJ Golf defendants. The breach of contract claim was predicated on a third-party beneficiary theory and based on allegations that the RJ Golf defendants breached the Management Agreement between RJ Golf and GTR Glacier by failing to make payments due under the land contract and sprinkler lease. The tortious interference claim was based on allegations that the RJ Golf defendants tortiously interfered with the land contract, the sprinkler lease, and the subsequent purchase agreement for the golf course. The conversion claim was based on allegations that several property items were missing from the golf course after Wells Venture regained a possessory interest in the property upon forfeiture of the land contract.

To summarize with generic labels: a land contract vendor sold a golf course to a land contract vendee; the land contract vendee then entered into a lease for a golf course sprinkler system with a lessor, who later assigned its lease rights to the land contract vendor; the land contract vendee next entered into a purchase agreement to sell the golf course to outside corporate entities, but there was never a closing; at about the same time, the land contract vendee entered into an agreement with a management company to have the company manage the vendee's golf course operations, which included paying expenses and costs on behalf and for the

benefit of the vendee; the management company and the prospective purchasers of the golf course had common principals; the land contract vendee defaulted on the land contract and the sprinkler lease; and then the land contract vendor sued, seeking to hold the management company liable for the default on the land contract and sprinkler lease and for the failure of the new purchase agreement to be consummated.

Wells Venture brought a motion for summary disposition of its claims against the RJ Golf defendants pursuant to MCR 2.116(C)(10). The trial court denied that motion and instead granted summary disposition in favor of the RJ Golf defendants on the breach of contract and tortious interference claims pursuant to MCR 2.116(I)(2). The conversion claim proceeded to trial, after which the trial court determined that Wells Venture did not have a valid claim for conversion.

II. SUMMARY DISPOSITION – PRINCIPLES

Wells Venture first argues that the trial court erred in denying its motion for summary disposition under MCR 2.116(C)(10), and instead granting summary disposition in favor of the RJ Golf defendants under MCR 2.116(I)(2), on the claims for breach of contract and tortious interference with a contract. We review de novo a trial court's ruling on a motion for summary disposition. *Spiek v Mich Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), this Court recited the well-established principles regarding a motion brought pursuant to MCR 2.116(C)(10):

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and internal quotation marks omitted.]

"If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2).

III. SUMMARY DISPOSITION – BREACH OF CONTRACT

Wells Venture's breach of contract claim was based on its contention that the RJ Golf defendants breached the Management Agreement by failing to make payments on the land

contract and the sprinkler lease. Although Wells Venture acknowledges that it was not a party to the Management Agreement, it maintains that it was a third-party beneficiary of that agreement and, therefore, it was entitled to bring an action to enforce RJ Golf's obligations under the agreement.

With respect to the land contract issue, Wells Venture's breach of contract claim fails because, even though the Management Agreement called for RJ Golf to make any land contract payments that became due and payable to Wells Venture during the short life of the Management Agreement, it also specifically provided that GTR Glacier was not assigning or transferring to RJ Golf its liability on existing contracts, which would include the land contract. The breach of contract claim also fails because, as to the land contract matter, RJ Golf was merely acting as GTR Glacier's agent; therefore, third-party beneficiary rights controlled by MCL 600.1405[1] did not arise. *Uniprop, Inc v Morganroth*, 260 Mich App 442, 449; 678 NW2d 638 (2004) (we "hold that agency agreements do not create rights in third parties"); *Koppers Co, Inc v Garling & Langlois*, 594 F2d 1094, 1098 (CA 6, 1979). The Management Agreement generally identified RJ Golf as an independent contractor, and it specified that RJ Golf was not an agent, *except as specifically provided in the agreement.* The breach of contract claim further fails because no principal land contract payments became due and payable after the Management Agreement went into effect and before it terminated, where the land contract was due and payable in full under a balloon provision prior to the effective date of the Management Agreement, where the attempted 2007 amendment of the land contract was contingent on an immediate payment of approximately $150,000 that was not made, and where, assuming the amendment was effective, it deferred regular land contract payments until a date falling after expiration of the Management Agreement. Finally, the breach of contract claim additionally fails in regard to the land contract, given that Wells Venture exercised its option and obtained a judgment of possession in a land contract forfeiture action, barring a claim for money due under the land contract. MCL 600.5750; *Mich Nat'l Bank v Cote*, 451 Mich 180, 184-185; 546 NW2d 247 (1996) (judgment for money damages to recover amounts due under a land contract is barred by forfeiture).

With respect to the sprinkler lease issue, the breach of contract claim fails for the reasons noted above in regard to the land contract relative to the Management Agreement's provision exempting RJ Golf from liability for GTR Glacier's contractual obligations and the fact that RJ Golf was merely acting in an agency capacity on GTR Glacier's behalf in connection with paying expenses and costs. Additionally, the breach of contract claim fails because, as found by the trial court, the Management Agreement generally covered "the business activities of [the] . . . restaurant/bar business . . . situated at Glacier Club Golf Course[,]" which plainly and unambiguously would not encompass the sprinkler system. As opposed to the provision that expressly addressed the land contract, the Management Agreement did not have a specific

[1] MCL 600.1405 provides that "[a]ny person for whose benefit a promise is made by way of contract . . . has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee." The promisor must have "undertaken to give or to do or refrain from doing something directly to or for" the person claiming to be a third-party beneficiary. MCL 600.1405(1).

provision regarding the sprinkler lease. Thus, the general duties listed in the agreement to pay costs and expenses were confined to the restaurant and bar business at the club. To the extent that deposition testimony indicated a different interpretation of the Management Agreement, the parol evidence rule prohibits consideration of extrinsic evidence to vary clear and unambiguous language. *Shay v Aldrich*, 487 Mich 648, 667; 790 NW2d 629 (2010).

IV. SUMMARY DISPOSITION – TORTIOUS INTERFERENCE WITH A CONTRACT

For its tortious interference claim, Wells Venture maintains that the RJ Golf defendants tortiously interfered with (1) the land contract and sprinkler lease agreement, and (2) the consummation of the new purchase agreement for the golf course between GTR Glacier, as seller, and Gall-Vargo Properties, L.L.C., and JR Assets, L.L.C., as purchasers. Wells Venture argues that the trial court improperly analyzed its claim as one for tortious interference with a business relationship or expectancy, rather than a contract. It also argues that the trial court erred by limiting its analysis to whether the RJ Golf defendants tortiously interfered with the *valuation* contained in the new purchase agreement,[2] ignoring other aspects of its claim.

Tortious interference with a contract is a distinct claim from tortious interference with a business relationship or expectancy. *Knight Enterprises, Inc v RFP Oil Co*, 299 Mich App 275, 279-280; 829 NW2d 345 (2013). The elements of a claim for tortious interference with a contract are "(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Id.* at 280 (citation omitted). A party claiming tortious interference with a contractual relationship must establish the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights of another. *Id.*

Wells Venture asserts that the conduct of the RJ Golf defendants tortiously interfered with both the land contract and sprinkler lease agreement. In support of this argument, however, Wells Venture relies solely on its previous failed arguments relative to its breach of contract claim, and asserts within this subissue that RJ Golf "did, in fact, have a contractual obligation to make both land contract and sprinkler lease payments in the ten month period that the Management Agreement was in effect." Furthermore, Wells Venture's complaint concerns conduct occurring during the existence of the Management Agreement, but the RJ Golf defendants were acting as GTR Glacier's agents at the time, and they were thus generally incapable of tortiously interfering with the contracts given that connection. *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 593; 683 NW2d 233 (2004) ("To maintain a cause of action for tortious interference, the plaintiff must establish that the defendant was a 'third party' to the contract rather than an agent of one of the parties acting within the scope of its authority as an agent.").

Wells Venture further argues that the RJ Golf defendants "improperly interfered with the consummation of the purchase agreement" entered into between GTR Glacier and Gall-Vargo Properties and JR Assets. Wells Venture argues that it has a valid tortious interference claim

[2] On appeal, Wells Venture does not challenge this portion of the trial court's ruling.

because "defendant[s'] tortious conduct resulted in the fact that no sale was ever completed." This argument fails because Wells Venture was not a party to the purchase agreement. Because a tortious interference claim requires a showing that a defendant invaded the contract rights of another, Wells Venture cannot establish a valid claim for tortious interference with a contract predicated on the purchase agreement unless it can show that it had rights under that agreement. In its brief on appeal, Wells Venture maintains that it was a third-party beneficiary of the purchase agreement. However, Wells Venture does not identify any evidence that supports this allegation. "Third-party beneficiary status requires an express promise to act to the benefit of the third party; where no such promise exists, that third party cannot maintain an action for breach of the contract." *Dynamic Constr Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995). Wells Venture does not identify any express promise by a party to the purchase agreement to act for its benefit.

Additionally, even assuming that Wells Venture could establish rights under the purchase agreement, it does not explain how the RJ Golf defendants tortiously interfered with a closing on the purchase agreement, nor did Wells Venture submit any evidence of tortious interference, as necessary to survive summary disposition under MCR 2.116(C)(10).

Furthermore, Vargo and Gall were agents of Gall-Vargo Properties and JR Assets, the purchasers under the agreement, and therefore Vargo and Gall could not, in general, tortiously interfere with the purchase agreement. *Lawsuit Fin*, 261 Mich App at 593. Wells Venture argues that the purchasers were separate legal entities or parties distinct from the RJ Golf defendants, which is true, but the argument misses the point that Vargo and Gall were agents of the purchasers, thereby making a difference in the analysis and defeating the tortious interference claim.

For these reasons, we affirm the trial court's decision granting summary disposition in favor of the RJ Golf defendants on Wells Venture's claim of tortious interference with a contract.

V. CONVERSION

Following a bench trial, the trial court determined that Wells Venture did not have a valid claim for conversion against RJ Golf or Vargo.[3] We review a trial court's findings of fact in a bench trial for clear error. *Carrier Creek Drain Drainage Dist v Land One, LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). A finding of fact is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Id*. at 329-330.

Conversion involves "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992).

[3] Wells Venture's conversion claim against Gall was dismissed at trial. Wells Venture does not challenge that decision on appeal.

Wells Venture does not challenge the trial court's determination that it could only assert a claim of ownership over property items "that would have constituted a fixture on the premises[,]" inasmuch as those items "would have reverted to Wells Venture's ownership when the Land contract was forfeited." Instead, Wells Venture argues that the trial court erred in determining what items of property qualified as "fixtures." The record discloses that the trial court considered several items that were observed to be missing from the property after the forfeiture. The court stated:

> Of all the items found to be "missing" from the golf course following the forfeiture of the Land Contract, only the Toro irrigation box, waterfall pump, time clock, green divot boxes, ball washer stands, irrigation radios, air conditioning unit, dishwasher, cash registers, wire tracker, table grinders, convection oven, 42-inch LCD televisions and ball picker assembly can arguably be said to have been fixtures.

After analyzing each of these items, the court determined that only the time clock qualified as a fixture. However, the court also determined that Wells Venture "did not succeed to any ownership interest in fixtures until after the land contract forfeiture" and found that "Wells Venture has not proffered any evidence suggesting R.J. Golf Management and/or Vargo took possession of any fixtures after the Land Contract forfeiture date." Although the court found that Vargo had converted the time clock, it found that this conversion occurred while the property was still owned by GTR Glacier, so only GTR Glacier would have a claim for conversion. Accordingly, the court ruled that Wells Venture did not have a valid conversion claim against RJ Golf or Vargo.

Although Wells Venture now argues that the trial court "seriously misperceived the law defining the concept of fixtures," the only two items that it discusses in its analysis of this issue are the divot boxes and the ball washers. Wells Venture argues that the trial court erred in finding that these two items were not fixtures merely because they were movable.

"Property is a fixture if (1) it is annexed to the realty, whether the annexation is actual or constructive; (2) its adaptation or application to the realty being used is appropriate; and (3) there is an intention to make the property a permanent accession to the realty." *Wayne Co v Britton Trust*, 454 Mich 608, 610; 563 NW2d 674 (1997). According to the testimony at trial, the divot boxes were secured to the ground by a stake, and the ball washers were secured to the ground with a spike. Both were important to the operation of the land as a golf course. But to constitute a fixture, there must also be an intent to make the item a permanent part of the property. That was lacking here. While we agree that the mere fact that the divot boxes and ball washers were movable does not prevent them from being fixtures, it does not make them so either. Wells Venture cites no evidence indicating that these items were intended to be permanently affixed to the ground. At trial, Vargo testified that the items were not permanently affixed to the ground and explained that the items were moved when the grass was cut or the tee lines were relocated. In light of this evidence, the trial court did not clearly err in finding that these items were not fixtures.

Accordingly, we affirm the trial court's dismissal of Wells Venture's claim for conversion.

VI. DENIAL OF MOTION TO AMEND

Wells Venture argues that the trial court erred in denying its motion to amend its complaint to add claims for fraudulent conveyance against the RJ Golf defendants, and to add additional parties to allege claims against them under the Uniform Fraudulent Transfer Act (UFTA), MCL 566.31 *et seq.*, as alleged transferees of assets from RJ Golf. The trial court determined that any claim for fraudulent conveyance would be repetitive of the other claims that Wells Venture had already brought and, therefore, denied the motion on that basis. We review a trial court's decision on a motion to amend pleadings for an abuse of discretion. *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). An abuse of discretion occurs when a trial court's decision results in an outcome falling outside a principled range of outcomes. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 625; 750 NW2d 228 (2008).

Any claim for fraudulent conveyance is dependent upon whether the RJ Golf defendants qualify as a debtor of Wells Venture under the UFTA. A debtor under the UFTA is one "who is liable on a claim." MCL 566.31(f). While the claim need not have been reduced to a judgment or be undisputed, the debtor who transfers an asset must actually be liable to the creditor. MCL 566.31(c); *Mather Investors, LLC v Larson*, 271 Mich App 254, 259; 720 NW2d 575 (2006). A tort claimant is a creditor from the date of the tort. *Doe v Ewing*, 205 Mich App 605, 607; 517 NW2d 849 (1994). Wells Venture acknowledges that any claim for fraudulent conveyance is germane only to its available remedies if it is able to establish the RJ Golf defendants' liability for the underlying contract, tortious interference, and conversion claims. Because we have concluded that there is no liability on the underlying claims, Wells Venture cannot proceed with any claim for fraudulent conveyance. Accordingly, we affirm the trial court's decision denying Wells Venture's motion to amend.

Affirmed. Having fully prevailed on appeal, the RJ Golf defendants are awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood