STATE OF MICHIGAN

COURT OF APPEALS

BRAVA ENTERTAINMENT GROUP, INC., Plaintiff-Appellee,	UNPUBLISHED May 10, 2007
v	No. 268047 Wayne Circuit Court
F.A.T. GROUP, L.L.C., and T.G.R. GROUP, INC., Defendants,	LC No. 05-500419-CH
and INTERBAY FUNDING, L.L.C., Defendant-Appellant.	

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this quiet title action, defendant, Interbay Funding, L.L.C. (Interbay), appeals as of right the trial court's order granting summary disposition in favor of plaintiff, Brava Entertainment Group, Inc. (Brava).[1] We affirm in part, reverse in part and remand for further proceedings.

I. Facts and Procedural History

This case involves a dispute over title to the Fine Arts Theater (the Theater), which is located at 2952 Woodward Avenue in Detroit. The Theater was originally purchased by TGR in 2000. On April 9, 2001, Gloria Ray, who was TGR's president at the time, recorded a lien in Wayne County against the Theater in the amount of $400,000 (Ray Lien). In May 2002, George Rider, who was ostensibly the owner of TGR, hired Valerie Atikian as executive vice president of TGR for the sole purpose of obtaining financing to repair the Theater. Valerie then

[1] Defendants, F.A.T. Group, L.L.C. (FAT) and T.G.R. Group, Inc. (TGR) are not parties to the present appeal.

approached John Yousif, who formed Brava as a limited liability company. In exchange for an assignment of the Ray Lien, Brava contributed $85,000 toward the Theater's renovation. On July 25, 2002, Brava transformed from a limited liability company to a corporation. The lower court record reveals that Valerie is listed as the sole incorporator on the articles of incorporation. Valerie's sister, Rita Atikian, was issued a 50 percent share of Brava stock; however, Yousif testified that Valerie was his "real" partner in Brava. On November 8, 2002, Ray terminated Valerie's employment with TGR along with other officers.

From 2002 to 2003, Brava provided approximately $500,000 to TGR for renovations on the Theater. At some point in 2003, Yousif determined that Brava should purchase the Theater from TGR so that he could secure his interest. Brava and TGR subsequently settled on a $505,000 purchase price. The closing took place at Metropolitan Title Company on September 23, 2003. Ray, Yousif and Valerie were all present. Relevant to the present case, four separate documents were exchanged at the closing. First, TGR sold the Theater by warranty deed to Brava for $505,000. Ray, as president of TGR, signed the warranty deed. Second, Brava granted TGR an option to purchase the Theater. Under the terms of the option, TGR agreed to pay $10,000 per month for 24 months. At the end of the 24-month period, TGR had the option to purchase the Theater for $600,000 with credit for the monthly payments. The Option Agreement also contained the following clause:

> In the event that Purchaser [TGR] fails to exercise the Option or otherwise fails to pay the monthly Option price as the case may be, Seller [Brava] shall notify Rita Atikian and/or Valerie Atikian in writing by overnight courier, certified mail or personal delivery of the Purchaser's failure to exercise or otherwise extend the term of this Option or default in the payment of the monthly Option payments then Rita Atikian and/or Valerie Atikian shall have the right at anytime on or before the expiration of the fifteenth (15^{th}) day after notice is given, to purchase fifty percent (50%) of the Land for the sum of one dollar ($1.00).

Third, Brava granted a $600,000 lien (Yousif lien) to Yousif and his wife, Sharon, in exchange for "good and valuable consideration." Finally, Ray discharged a previously recorded affidavit of fraud, which indicated that the assignment of the Ray Lien was not forged.

Yousif testified that he brought $175,000 in a certified cashiers check to the closing. According to the Metropolitan Title documents: (1) the $400,000 Ray Lien was credited against the $505,000 purchase price; (2) $13,560.77 was paid to Fashion Trendz International, Inc., which was a separate entity formed by Valerie; and (3) Yousif received $70,000 back from the $175,000 in cash he brought to closing. Valerie deposited the $13,560.77 check she received at closing in the business account for Fashion Trendz International, Inc. Shortly thereafter, Valerie turned the entire amount, in cash, over to Rider. Valerie testified she did this because "Rider asked for it to be done that way." Yousif also testified that he had an oral agreement with Rider to purchase a home owned by the mother of Vanettra Powell, who was a former officer of TGR. Yousif testified that, in exchange for the $400,000 Ray Lien being credited against the purchase price of the Theater, he acquired a home out of foreclosure that was owned by Vanettra Powell's mother.

The Yousif lien was recorded on October 8, 2003, the Option Agreement was recorded on October 15, 2003, and the warranty deed was recorded on November 26, 2003. On December

3, 2003, Interbay agreed to loan $399,000 to TGR . The loan was secured by an assignment of rents[2] and a mortgage on the Theater (Interbay mortgage), which where both executed on December 3, 2003, by officers of Interbay and George Rider, as executive vice president of TGR. Greco Title Company conducted the closing on the Interbay mortgage and the assignment of rents on December 3, 2003. At the time, Greco did not discover any encumbrances on the Theater, including the warranty deed. Rider directed that $50,000 of the funds received from Interbay be distributed to Fashion Trendz International, Inc. Valerie testified that she received the $50,000 check, deposited it in the business account and gave $30,000 in cash to Rider.

On December 26, 2003, Interbay filed a UCC financing statement setting forth its security interest in the "property, buildings, improvements, appurtenances, tangible property, rents, contract rights, other intangibles and secondary financing" of the Theater. On April 15, 2004, the Interbay mortgage was recorded. On September 28, 2004, Rita exercised her right under the Option Agreement and obtained a 50 percent interest in the Theater by paying Brava $1. The claim of interest was recorded on October 15, 2004.

In January 2005, Brava sued TGR, FAT and Interbay to quiet title to the Theater. In March 2005, the trial court entered an order granting Brava's motion for entry of default against TGR. In September 2005, the trial court dismissed FAT after FAT reached a settlement with Brava. Thereafter, Interbay was the only remaining defendant.

In October 2005, Interbay moved to compel production of certain documents and moved for an extension of the period for discovery. Interbay argued that further discovery was required because the initial discovery had revealed the possibility that Brava and TGR were alter egos or conspired to defraud Interbay. In November 2005, Interbay also moved to add fraud counterclaims against Brava and TGR. The trial court denied all three motions.

In November 2005, Brava moved for summary disposition under MCR 2.116(C)(10). Brava argued that summary disposition was appropriate because Interbay had constructive notice of Brava's interest in the Theater and failed to establish a question of fact concerning whether Brava participated in any fraud against Interbay. In January 2006, the trial court held a hearing on the motion and granted summary disposition in favor of Brava. On January 17, 2006, the trial court entered an order quashing Interbay's mortgage, assignment of rents and UCC financing statement.

This appeal followed.

II. Motions to Extend Discovery, Compel Discovery Responses and Add a Counterclaim

Interbay first argues on appeal that the trial court abused its discretion when it denied Interbay's motions to amend the scheduling order to extend the discovery cutoff date, to compel Brava's discovery responses and for leave to add a counterclaim. We disagree.

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[2] At the time the Interbay mortgage was executed, FAT was leasing the Theater from Brava.

This Court reviews a trial court's decision concerning a motion to amend the scheduling order for an abuse of discretion. *Nuriel v YWCA*, 186 Mich App 141, 146; 463 NW2d 206 (1990). Similarly, a trial court's decision on a motion to compel discovery is reviewed for an abuse of discretion. *Cabrera v Ekema*, 265 Mich App 402, 406; 695 NW2d 78 (2005). Finally, this Court reviews a trial court's decision regarding a motion for leave to amend pleadings for an abuse of discretion. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In *Hamed v Wayne Co*, 271 Mich App 106, 109-110; 719 NW2d 612 (2006), this Court discussed the competing interests that must be balanced by a trial court when resolving discovery disputes:

> Michigan has long espoused a liberal discovery policy that permits the discovery of any matter, not privileged, that is relevant to the subject matter involved in the pending case. MCR 2.302(B)(1); *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). The purpose of discovery is to simplify and clarify the contested issues, which is necessarily accomplished by the open discovery of all relevant facts and circumstances related to the controversy. See *id.*, citing *Domako v Rowe*, 438 Mich 347, 360; 475 NW2d 30 (1991). However, the court rules also ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests. MCR 2.302(C); *Cabrera*[*, supra* at 407]; I*n re Hammond Estate*, 215 Mich App 379, 386; 547 NW2d 36 (1996).

Moreover, discovery should not be extended merely to allow a "fishing expedition." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004).

We conclude that the trial court did not abuse its discretion when it determined that discovery should not be extended. The trial court's original scheduling order listed a discovery cutoff date of August 18, 2005. Further, the lower court record indicates that the parties stipulated to extend discovery to November 17, 2005. Interbay brought a second motion to extend the scheduling order on October 28, 2005, arguing that it had not obtained the depositions of certain witnesses. However, the lower court record reveals that the trial court granted Interbay's earlier motions to provide for alternative service for the missing witnesses, including Ray, and that the trial court issued bench warrants based on their failure to appear for depositions. The trial court had done all it could within its power to allow for the depositions of the missing witnesses. Further, the lower court record reveals that Interbay's second motion for extension of the discovery cutoff was filed almost one year after the complaint. Under these facts, we conclude that the trial court's decision to deny Interbay's second motion for extension of the discovery cutoff was within the range of reasonable and principled outcomes. *Maldonado, supra* at 388.

We also conclude that the trial court properly denied Interbay's motion to compel response to its discovery requests. On February 11, 2005, Interbay served Brava with its first request for production of documents. The lower court record reveals that Brava responded to Interbay's discovery requests on March 7, 2005, and produced approximately 109 pages of

documents relating to the sale of the Theater. Moreover, the record shows that Brava provided Interbay with a supplemental response to its discovery request on November 14, 2005. Interbay argued below and now argues on appeal that Brava failed to disclose additional documents in its possession. However, Brava indicated at the November 18, 2005, hearing that it had turned over all relevant documents and characterized any outstanding documents as personal "love letters" between Valerie and Rider that were irrelevant to the proceeding. Brava also indicated its willingness to provide the trial court with these "love letters" and allow an in camera review. Interbay's argument that Brava is withholding documents is based solely on speculation and conjecture. *VanVorous, supra* at 477. Moreover, Interbay has failed to show that Brava did not produce all relevant documents relating to the sale of the Theater. Accordingly, the trial court did not abuse its discretion when it denied Interbay's motion to compel discovery.

Finally, we conclude that the trial court properly denied Interbay's request for leave to file a counterclaim against Brava. By the time of defendant's motion, it could not add a counterclaim without the leave of the trial court. See MCR 2.118(A)(2); MCR 2.203(E). However, leave to amend pleadings is granted freely in the interest of justice, except where the court finds that particular reasons justify denial of the opportunity. *Jenks, supra* at 420. A trial court should only deny a motion to amend for reasons such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, or futility. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

In the present case, Interbay sought leave to amend its answer and add a counterclaim against Brava based on Interbay's claim that Brava was a "mere alter ego" of TGR. This motion was filed on November 28, 2005. Interbay failed to show good cause for the delayed amendment. Further, although the trial court did not articulate specific reasons for denying leave to add a counterclaim, we conclude that Interbay's counterclaim for fraud would have caused undue delay. *Weymers, supra* at 658. Interbay asserted the same argument in its affirmative defenses and set forth substantially similar arguments in its response to Brava's motion for entry of default judgment. The proposed counterclaim would have been cumulative in light of these motions. Accordingly, the trial court's decision to deny Interbay's motion for leave to file a counterclaim was not an abuse of discretion because it was within the range of reasonable and principled outcomes. *Maldonado, supra* at 388.

III. Application of the Clean Hands Doctrine to Quiet Title Actions

Interbay next argues that the trial court erred in granting Brava's motion for summary disposition because it created a question of fact regarding whether Brava is barred by the clean hands doctrine from claiming a superior interest in the Theater and that Brava cannot "shield" itself with the recording statute. We agree.

An action to quiet title is equitable nature and is subject to de novo review on appeal. *Richards v Tibaldi*, 272 Mich App 522, 528-529; 726 NW2d 770 (2006); see also MCL 600.2932(5). If a plaintiff makes out a prima facie case to quiet title, the defendant then has the burden of proving superior right or title in itself. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999).

This Court reviews de novo the grant or denial of a motion for summary disposition. *Cawood v Rainbow Rehab Ctr,* 269 Mich App 116, 118; 711 NW2d 754 (2005). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "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." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

We first note that, under the recording statute, Brava's interest in the Theater has priority over the Interbay mortgage. Michigan is a race-notice state. *Richards*, *supra* at 539. MCL 565.25(4) provides:

> The instrument shall be considered as recorded at the time so noted and shall be notice to all persons except the recorded land owner subject to subsection (2), of the liens, rights, and interests acquired by or involved in the proceedings. *All subsequent owners or encumbrances shall take subject to the perfected liens, rights or interests*. [Emphasis added.]

Thus, a recorded instrument serves as notice to all persons and all subsequent owners or encumbrances take subject to the perfected liens, rights or interests. *Piech v Beaty*, 298 Mich 535, 538; 299 NW 705 (1941). Pursuant to MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers. *Richards, supra* at 539. MCL 565.29 provides, in pertinent part:

> Every conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded. . . .

A "conveyance" is defined as "every instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged or assigned." MCL 565.35. "A good faith purchaser is one who purchases without notice of a defect in the vendor's title." *Michigan National Bank v Morren,* 194 Mich App 407, 410; 487 NW2d 784 (1992). Notice can be actual or constructive. *Richards, supra* at 539. A party cannot be considered a bona fide purchaser if that party knows at the time a deed is received that the grantor lacks title to the property being conveyed or has notice that the grantor may not have title. *Id*. at 539-540. Constructive notice is defined as "'notice that is imputed to a person concerning all matters properly of record, whether there is actual knowledge of such matters or not.'" *Id.* at 540, quoting 1 Cameron, Michigan Real Property Law (3d ed), § 11.24, p 399.

In the present case, there is no indication in the lower court record that Brava was not a good faith purchaser for value of the Theater on September 23, 2003. Interbay has failed to show that Brava had knowledge of a defect in TGR's title. *Michigan National Bank, supra* at 410. Indeed, the lower court record reflects that TGR had purchased the Theater on May 25, 2000, for $360,000. The documentary evidence submitted below also shows that Brava

purchased the Theater by warranty deed for $505,000 from TGR on September 23, 2003. Furthermore, there is no factual dispute that the Yousif lien, the Option Agreement and the warranty deed were each recorded before the Interbay mortgage and the assignment of rents. Each of these three instruments is considered a conveyance under MCL 565.35. The lower court record reveals that the Yousif lien was recorded on October 8, 2003, the Option Agreement was recorded on October 15, 2003, and the warranty deed was recorded on November 26, 2003. Moreover, the record shows that the Interbay mortgage and the assignment of rents were recorded on April 15, 2004. Finally, constructive notice of the Yousif lien, the Option Agreement and the warranty deed can be imputed to Interbay at the time of the execution of the Interbay mortgage because each prior encumbrance on the Theater was properly recorded. *Richards, supra* at 540. Accordingly, the trial court properly found that, based solely on the recording statutes, Brava's interests in the Theater, including the Yousif lien, the Option Agreement and the warranty deed, are superior to Interbay's mortgage. *Id*. at 539.

However, the lower court record supports Interbay's argument that it created a question of fact regarding whether Brava was barred by the clean hands doctrine from claiming a superior interest in the Theater. In *Richards, supra* at 537, this Court discussed the application of the clean hands doctrine to actions to quiet title:

> "The clean hands doctrine applies to quiet-title actions." *McFerren v B&B Investment Group*, 253 Mich App 517, 523; 655 NW2d 779 (2002). The maxim that a party who comes into equity must come with clean hands is an elementary and fundamental concept of equity jurisprudence. *Rose v Nat'l Auction Group*, 466 Mich 453, 462; 646 NW2d 455 (2002). The clean-hands doctrine closes the doors of equity to one tainted with inequitableness or bad faith relative to the matter in which he or she seeks relief, regardless of the improper behavior of the defendant. *McFerren, supra* at 522-523. If there are indications of unfairness or overreaching on an equity plaintiff's part, the court will refuse to grant him or her equitable relief. *Rose, supra* at 462.

"[A] Court acting in equity looks at the whole situation and grants or withholds relief as good conscience dictates." *McFerren, supra* at 522, quoting *Hunter v Slater*, 331 Mich 1, 7; 49 NW2d 33 (1951). "In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party not whether that party relied upon plaintiffs' misrepresentations." *Stachnik v Winkel*, 394 Mich 375, 387; 230 NW2d 529 (1975). "The misconduct which will move a court of equity to deny relief must bear a more or less direct relation to the transaction concerning which complaint is made." *McKeighan v Citizens Commercial & Savings Bank of Flint*, 302 Mich 666, 671; 5 NW2d 524 (1942).

In *McFerren, supra* at 523, this Court affirmed the trial court's determination that the plaintiff's misconduct in seeking to conceal his ownership of a condominium barred his suit to quiet title. There, the plaintiff originally purchased a condominium, and failed to timely record the deed. *Id*. at 520. Subsequently, the defendant purchased the property at a tax sale. *Id*. at 520-521. Plaintiff then sued to quiet title. *Id.* at 521. The trial court determined that, in addition to the plaintiff's failure to pay taxes or condominium association assessments, the "plaintiff attempted to conceal assets from the federal government and his former wife and committed a fraud on the court in his divorce by failing to record his deed to the property and representing to

others that he merely leased the property." *Id*. at 523. This Court affirmed the trial court's application of the clean hands doctrine. *Id*. at 523. This Court rejected the plaintiff's argument that application of the clean hands doctrine was barred because the misconduct was directed at an unrelated third party. *Id*. at 524. The *McFerren* Court reasoned that the "plaintiff's attempt to conceal his ownership of the property directly led to the cloud on title that he sought to clear in [the quiet title] action." *Id*.

In the present case, we conclude that Interbay created a question of fact regarding whether Valerie acted on behalf of both Brava and TGR. The lower court record reveals that before and during the September 23, 2003, sale of the Theater to Brava, Valerie represented TGR and Brava. Valerie testified that she was first hired by Rider in May 2002 as executive vice president specifically for the purpose of obtaining financing to renovate the Theater. Valerie then approached Yousif and requested that he contribute $85,000 toward the project. Yousif then formed Brava to finance the Theater's repairs. On July 25, 2002, Valerie, on Yousif's behalf, incorporated Brava, and Valerie's sister Rita was issued 50 percent of the stock in the company. Yousif testified that, although Rita's name is listed on the stock certificates, Valerie was the "real" partner in Brava. In addition to her interest in Brava stock, Valerie, through Rita, also obtained a 50 percent share in the Theater after TGR defaulted on the Option Agreement. According to Valerie's testimony, although she was no longer employed as vice president of TGR, she was present at and assisted with the sale of the property on September 23, 2003, on Brava's behalf.

Furthermore, Interbay created a question of fact regarding whether Valerie was aware of the prior conveyance of the Theater at the time the Interbay mortgage was executed. The lower court record shows that George Rider, as executive vice president of TGR, obtained the $399,000 Interbay mortgage on December 3, 2003. According to Valerie's testimony, in addition to being employed by TGR before the sale of the Theater to Brava, she also had an ongoing relationship with Rider from March 2003 to March 2004. Valerie also shared in the Interbay mortgage proceeds. Valerie testified that she received $50,000 through her company Fashion Trendz International, Inc., and that she was aware that the funds were from the Interbay mortgage. Interbay supported this claim by submitting documentary evidence to show that Valerie received $50,000 of the Interbay mortgage and that this was done at Rider's direction.

In summary, the lower court record shows that Valerie was acting on behalf of both TGR and Brava before the sale of the Theater and that she was aware that Brava received the warranty deed. Further, Valerie had knowledge of the fact that TGR did not have an interest in the Theater at the time TGR obtained the Interbay mortgage and the evidence suggests that she acted in collusion with Rider to obtain the mortgage. Finally, the documentary evidence clearly supports the fact that Valerie shared in the proceeds of the Interbay mortgage and that she, through her sister's ownership interests in Brava and the Option, directly benefited from Brava's purchase of the Theater from TGR. Viewing the evidence in a light most favorable to Interbay, a question of fact exists regarding whether Brava's interest is sufficiently tainted by Valerie's actions that it should be precluded from obtaining the equitable relief it now seeks. *Stachnik, supra* at 387. Because there are questions of fact concerning unfairness and overreaching on Brava's part through the actions of Valerie, the trial court erred in granting equitable relief in favor of Brava under MCR 2.116(C)(10). *Rose, supra* at 462. Instead, the trial court should have conducted a trial on the merits and made specific factual findings regarding Brava's

knowledge and complicity in the actions taken by TGR with respect to the Interbay loan. Only after resolving the factual disputes could the trial court determine whether the clean hands doctrine applied to bar Brava's request for equitable relief. Accordingly, we reverse the trial court's order granting Brava's motion for summary disposition.

Plaintiff separately argues on appeal that Brava is barred from claiming a superior interest in the Theater because Brava obtained the warranty deed through a fraudulent transfer under the Uniform Fraudulent Transfer Act, MCL 566.31 *et seq*. In light of our resolution of the previous issue, we decline to decide this issue.

Affirmed in part, reversed in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra