STATE OF MICHIGAN

COURT OF APPEALS

WORLD SAVINGS BANK,

Plaintiff-Appellee,

v

DALALY DABISH,

Defendant-Appellant,

and

DALE A. DEPRIEST, BARBARA DEPRIEST, VELMA N. DEPRIEST, RUSSELL JAMES BALASCO, and KRYSTAL SHAOUNI,

Defendants.

UNPUBLISHED
April 21, 2011

No. 296277
Oakland Circuit Court
LC No. 2009-098129-CH

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

In this action to quiet title, plaintiff moved for summary disposition under MCR 2.116(C)(10) on the theory that the deeds and land contract transferring certain property should be reformed. Defendant Dalaly Dabish appeals as of right from the trial court's order granting plaintiff's motion for summary disposition. We reverse and remand.

I. FACTS AND PROCEEDINGS

At issue are three adjacent parcels of lakefront property upon which a house has been situated since at least 1982. Each parcel has its own tax number. For convenience, we will refer to the parcels by their last tax number digit; thus, Parcel 1 is the northernmost of the three, Parcel 2 is next, and Parcel 3 is southernmost. Parcels 1 and 2 together were platted as Lot 186, Parcel 3 was not designated as a lot on the plat, and south of Parcel 3 is Lot 185.

In 1982, defendant contracted with the DePriests to purchase by land contract the house and the then-vacant lot across the street from the house (Lot 1 of the plat). Two contracts were drawn up: one for "All of LOTS 1 and 186" in the amount of $10,000, and one providing a legal description of Parcel 3, stating the land is "lying between LOTS 185 and 186 . . . and lying east of East shore of WALLED LAKE and West of West line of WALLED LAKE ROAD," in the

amount of $70,000. Defendant satisfied at least the second of these and was given a warranty deed from the DePriests that included the legal description of Parcel 3 only. From that point on, all relevant conveyances included this legal description, clearly identifying the parcel as 40 feet wide (road and lake frontage) with 50- and 70-feet-long sides, "lying between LOTS 185 and 186." Conveyances identifying the parcel by tax number show only the number for Parcel 3. Only one conveyance also included the street address of the house.

The chain of title of Parcel 3 underwent a split in a series of transactions. Defendant gave a mortgage that was foreclosed and the lender took title through a sheriff's deed (first chain); defendant also quitclaimed the parcel to her brother, who lost it through a tax levy and sheriff's deed. Ultimately, defendant's son and daughter-in-law, William and Ibitsam Dabish, rejoined the split by buying both sheriffs' deeds and took title to Parcel 3. In 2001, the son and daughter-in-law gave a $375,000 mortgage to plaintiff. This was foreclosed in 2008. When plaintiff tried to take possession of the house, it discovered that the mortgage described only a fraction of the lakefront property.

Plaintiff brought suit seeking "reformation of the documents containing the partial legal description as well as a judgment quieting title in its favor." Defendant filed a cross-complaint against the DePriests, alleging that the land contracts mistakenly mixed the description of parcels from the lakefront property with the description of Lot 1 and that she was surprised to learn the warranty deed she held had conveyed only Parcel 3. Defendant requested that the trial court grant her either a warranty deed on all three parcels or enter judgment quieting title to the property in her favor.

Discovery led to defendant's deposition, in which she testified that when she deeded property to her brother in 1983 for $48,000, she did not intend to convey all of the lakefront property, but only a part. She also testified that she had lived in the house from the time of the land contract up until "like a year and a half" before August 2009, except for a couple of times there was a problem with mold. No other depositions were taken.

Plaintiff obtained a consent judgment from Barbara DePriest, in which she agreed that the warranty deed from the DePriests to defendant was intended to convey all three lakefront parcels. She also transferred to plaintiff any interest she had in the property. The order reformed the land contracts and warranty deed conveying the properties so that one land contract covered Lot 1 and the other covered Parcels 1, 2, and 3, and the deed conveyed Parcels 1, 2, and 3. It also dismissed Barbara DePriest from the case. Plaintiff obtained defaults from the other defendants except for Dalaly Dabish.

Plaintiff moved for summary disposition, arguing that reforming the documents in its favor was the only "reasonable and equitable outcome." Plaintiff referred to the parcels as "sublots" and stated, without citing legal authority, "The presence of the sublots does not necessarily mean that they can be divided and sold separately." Plaintiff argued that the presence of the house on all three parcels made it "impossible to divide and convey separately." Although plaintiff cited case law concerning contractual mistakes, plaintiff made no argument that a mistake had been made. Plaintiff concluded that because it had "properly foreclosed on the portion of the land where the house sits, therefore, it naturally follows that World Savings Bank is entitled to complete title of the property located at" 1354 East Lake Drive.

Defendant countered that there was no evidence any of the persons holding an interest in the property after the DePriests intended a conveyance of all three parcels. Defendant pointed to her testimony that it was not her intention to convey the entire property to her brother and noted that she had continued to pay property taxes on Parcels 1 and 2, and continued to live in the home. Defendant also argued that plaintiff's interest derived from the now-foreclosed mortgage given to it by William and Ibitsam Dabish. Regardless of whether there was a mistake in that conveyance, *defendant* was not a party to the mortgage. Nor was there any evidence that William and Ibitsam Dabish intended to encumber anything other than Parcel 3 or that they believed there was a mistake in the mortgage. Defendant noted that plaintiff may have a claim to reform the mortgage it was given, but that did not support a claim for possession against defendant. Finally, defendant argued that plaintiff's loss resulted from its own negligence in failing to investigate the property for which they received the mortgage. The only mistake involving defendant was the conveyance from the DePriests.

In its reply brief, plaintiff argued that it did not need to sue William and Ibitsam Dabish because they no longer had a current interest in the property, having lost it through foreclosure. Without citing evidence, plaintiff stated that the mortgage was intended to secure the home, including the three parcels. Plaintiff asserted that because defendant never applied for land division, she never had the right or authority to divide the property at the address or to sell of one-third of it. Local zoning ordinances prohibit lots of less than 80 frontage feet, so the 40-feet-wide "sublot" could not be conveyed separately. Because it is impossible for the property to be sectioned and conveyed in pieces, whether by defendant or by a court, the only possible solution, according to plaintiff, was to award the property in its entirety to either plaintiff or defendant. Plaintiff argued the equities were in its favor because it loaned money to its mortgagors, defendant benefited from that mortgage by being allowed to live in the home, and defendant should not be compensated for the mistake in the chain of title that began when she took possession of the property.

The trial court issued a written opinion after hearing oral argument. Finding for plaintiff, the court reasoned:

> Plaintiff has presented sufficient evidence to establish that it is legally entitled to a Deed containing the correct legal description and all 3 sublot tax ID numbers. No application for land division was ever filed by Defendant Dabish and therefore contrary to her assertion she never had the right or authority to divide the subject property and sell only 1 sublot.

II. ANALYSIS

In this Court, defendant argues that the trial court erred in reforming the documents because there was no evidence of a mistake between the parties to the contract. We hold that the trial court erred in granting plaintiff's motion for summary disposition.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A party that files a motion for summary disposition must follow the court rules in doing so. MCR 2.116(G)(3)(b) unequivocally provides that a party is "required" to submit affidavits,

depositions, admissions or other documentary evidence in support of the grounds asserted in the motion when moving under MCR 2.116(C)(10). Consequently, when a moving party fails to properly support their motion under these rules, it is properly denied. *Quinto v Cross & Peters*, 451 Mich 358, 362-363; 547 NW2d 314 (1996); *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 486, 475; 776 NW2d 398 (2009); *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 370; 775 NW2d 618 (2009) ("If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion").

Another principle governing motions for summary disposition is that the court cannot make findings of fact in deciding the motion. *Jackhill Oil Co v Powell Production Inc*, 210 Mich App 114, 117; 532 NW2d 866 (1995). Because a trial court cannot engage in fact finding when deciding a motion for summary disposition, plaintiff errs in asserting that we review in this case findings of fact for clear error. The "clear error" standard is utilized when a trial court makes findings after a bench trial or hearing, *Alan Custom Homes v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003), but error requiring reversal occurs (assuming no other basis exists to affirm) when the court makes findings of fact on a motion for summary disposition. *Amerisure Ins Co v Plumb*, 282 Mich App 417, 431; 766 NW2d 878 (2009).

In determining whether a genuine issue of *material* fact exists, we look to the substantive law governing the claims. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1990). Here, plaintiff brought a claim to quiet title on the basis of reformation, so to obtain summary disposition of its claim to quiet title plaintiff was required to establish its title in the subject property by obtaining reformation of the deeds. *Special Property VI, LLC v New Century Mtg Corp*, 273 Mich App 586, 590; 730 NW2d 753 (2007). "The 'general rule is that courts will follow the plain language in a deed in which there is no ambiguity.' But if 'the deeds fail to express the obvious intention of the parties, the courts will try to arrive at the intention of the parties . . . .'" *Johnson Family LP v White Pine Wireless, LLC*, 281 Mich App 364, 373; 761 NW2d 353 (2008), quoting *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). A deed may be reformed based on a mutual or unilateral mistake of the parties, but the party seeking reformation must prove the mutual mistake by clear and satisfactory evidence; that is, the evidence must be convincing and must clearly establish the right to reformation. *Johnson Family LP*, 281 Mich App at 379-380.

The only evidence plaintiff submitted in support of its motion for summary disposition were deeds, photos, land contracts and recordings made with the register of deeds. Although that evidence revealed that at some point the property being transferred changed to only Lot B, plaintiff presented no record evidence concerning either its own intention or that of defendant.[1] And, as noted above, intent is critical when it comes to obtaining reformation. Indeed, throughout its motion and supporting brief filed in the trial court, plaintiff recognized that it must

[1] Nor did plaintiff present any evidence establishing title in Parcels 1 and 2 under any other theory.

prove that the land contract "inadvertently" omitted a reference to two of the lots, and that the goal of reformation is to make the documents reflect the party's actual intent. Yet, none of the evidence submitted addressed intent, or whether the land contract description was a result of "inadvertence" or intentional decision-making. Consequently, plaintiff failed to submit evidence establishing a genuine issue of material fact, and the trial court erred in ruling otherwise.

In contrast, defendant presented deposition testimony and an affidavit that her deed to her brother was not intended to convey more than Parcel 3. Although plaintiff states that this is "nonsensical," it provides no evidence that this was not the intent of the parties to that deed. In fact, the detailed tax information sheets submitted to the trial court show that Parcel 3 was levied for outstanding taxes separately from Parcels 1 and 2. That there is a single house situated on all three lots creates a difficulty, but it does not create property rights in Parcels 1 and 2 in favor of plaintiff.

The trial court apparently found persuasive plaintiff's argument that defendant never subdivided the property. However, the evidence showed that this subdivision had already occurred when the land was platted. Even if Lot 186 is considered a single property because it was platted as one lot, Parcel 3 is not, and never was, part of Lot 186. While defendant could not *today* create a subdivision with less than 80 feet of frontage, the fact that this was done nearly 100 years ago makes Parcel 3 a legal, nonconforming use, and nothing prevents a legal, nonconforming lot from being conveyed. The trial court's conclusion that defendant herself improperly divided the land is contradicted by the fact that the original plat itself subdivided the land.

Finally, we note that nothing prevented plaintiff from discovering the problem with the deed on simple inspection. Had plaintiff taken reasonable care in ensuring what the property was, it would have been aware of the problem before taking the mortgage. "Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person." *Powers v Indiana & Michigan Electric Co*, 252 Mich 585, 588; 233 NW 424 (1930) (citation omitted).[2]

For these reasons, we reverse the trial court's order granting plaintiff's motion for summary disposition, and remand for entry of an order granting defendant summary disposition of plaintiff's complaint. MCR 2.116(I)(2). We do not retain jurisdiction.

Defendant may tax costs, having prevailed in full. MCR 7.219(A).

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[2] Defendant suggests a perfectly reasonable solution to this awkward problem. One of the parties can force the sale of the home in an action for partition.