STATE OF MICHIGAN

COURT OF APPEALS

EAGLE HOMES, LLC and RODEO HOMES, INC, Plaintiffs-Appellants, v TRI COUNTY BANK, Defendant-Appellee.	UNPUBLISHED July 17, 2012 No. 305201 Lapeer Circuit Court LC No. 09-042023-CH

Before: O'CONNELL, P.J., AND JANSEN AND RIORDAN, JJ.

PER CURIAM.

Plaintiffs, Eagle Homes and Rodeo Homes, appeal as of right the trial court's order granting summary disposition to defendant, Tri County Bank. We affirm.

I. BACKGROUND FACTS

Salvatore Pansera is the owner of Eagle Homes and Rodeo Homes, two companies involved in real estate development. The issue in this litigation involves the company's mortgage and loan agreements with Tri County Bank. While Salvatore is involved with three other companies that have defaulted on loan obligations to Tri County Bank, none of these companies are parties in this lawsuit.

On September 4, 2002, Rodeo Homes executed a commercial real estate mortgage and promissory note with Tri County Bank regarding property in Attica Township. Salvatore testified that while this property was vacant farmland and residential, it was held for speculative purposes and he was in the business of buying, selling and developing real property. As additional security for the loan, Rodeo Homes granted Tri County Bank a security interest in "any personal property or fixtures which may now or hereafter constitute any part of the Property, in all personal property in possession of the Lender but belonging to the Mortgagor[.]" Rodeo subsequently entered into a mortgage agreement in May 2004 concerning various parcels of property in Attica Townships.

Eagle Homes entered into a commercial real estate mortgage with Tri County Bank on January 18, 2005, for property in Imlay Township. As part of the agreement, Eagle Homes consented to Tri County Bank's security interest in "equipment, and other personal goods of whatsoever description which may now or hereafter be located, situated or affixed on and used in

connection with" the property. On April 13, 2005, Eagle Homes executed a commercial promissory note in favor of Tri County Bank for $450,000, secured by a "mortgage dated 9/4/02," and a purported pledge and hypothecation from Rodeo Homes and Antonia Pansera.

Rodeo Homes and Eagle Homes subsequently defaulted on their loan obligations. Tri County Bank sent notices to Eagle Homes and Rodeo Homes, informing them that they were in default, foreclosure sales were scheduled, and the redemption period was six months and would begin to run immediately after the foreclosure sale, in accordance with MCL 600.3240. The properties were sold at foreclosure sales in April 2009 and plaintiffs never exercised their redemption rights during any period. Tri County Bank also confiscated personal property located on the properties, including a Grizzly thumb attachment, a Hudson trailer, a dump truck, a Cepco scraper, and a John Deere tractor.

Plaintiffs filed a complaint for injunctive and declaratory relief on September 28, 2009, alleging trespass, conversion, slander of title, filing a document without legal cause, failure to provide a full and fair accounting, tortious interference with business relationship, and business defamation. Plaintiffs also filed a motion for entry of an order voiding the sheriffs' sales and a motion for summary disposition, arguing that the properties foreclosed upon were residential in nature and should have a year redemption period. The trial court disagreed, and found that the properties were commercial in nature and only required a six month redemption period. The court entered an order dismissing, with prejudice, all real property claims.

Defendant subsequently filed a motion for summary disposition regarding the personal property claims, arguing that plaintiffs did not own the equipment taken from the properties and, therefore, lacked standing to bring the claims. Defendant also alleged that it clearly had a security interest in the personal property and there was no genuine issue of material fact regarding its right to confiscate the property. Salvatore submitted an affidavit claiming that plaintiffs did own the equipment that was taken and plaintiffs argued that the security interest did not give defendant the right to confiscate the personal property. The trial court granted defendant's motion for summary disposition regarding the personal property claims. Plaintiffs now appeal.

II. MOTION FOR SUMMARY DISPOSITION

A. Standard of Review

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7) (statute of limitations), (8) (failure to state a claim), and (10) (no genuine issue of material fact). Because the trial court did not specify the grounds for granting summary disposition and considered material outside of the pleadings, "this Court will construe the motion as having been granted pursuant to MCR 2.116(C)(10)." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). "This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). In reviewing a motion pursuant to MCR 2.116(C)(10), "a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Summary disposition should be

granted when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

B. Redemption Period for Real Property

Michigan provides a redemption period for property subject to a foreclosure sale where the mortgagor "must pay the bid price plus interest, and any amount for taxes and insurance that the purchaser has properly filed with the register of deeds." *Senters v Ottawa Sav Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993). The time a mortgagor has to redeem the property varies according to the type of property subject to foreclosure. See MCL 600.3240(1). At issue in this case is whether the properties were residential or commercial. While residential property has a one year redemption period, commercial property has a six month redemption period. MCL 600.3240. The trial court found that the properties were commercial and, thus, only a six month redemption period was required. Plaintiffs', however, contend that the properties were residential in nature with an applicable redemption period of one year, not six months.

Regardless of whether the applicable redemption period was six months or one year, it is undisputed that plaintiffs did not tender the amount required during any period. It is a well settled that "[i]f plaintiff desired to preserve his rights, a tender should have been made while the statutory period was still running, because thereafter the right to redeem became extinct and absolute title vested in the mortgagee." *Strempek v First Nat'l Bank of Detroit*, 293 Mich 435, 437; 292 NW 358 (1940) (citations omitted). Accordingly, no genuine issue of material fact exists, as plaintiffs' failure to redeem the properties within six months or one year extinguished any right of redemption.[1]

C. Personal Property Claims

In regard to the personal property claims, plaintiffs likewise argue that summary disposition is improper. Plaintiffs contend that they had an ownership interest in the equipment and had standing to pursue these claims. Even assuming, arguendo, that plaintiffs had an ownership interest in the equipment, there is no genuine issue of material fact regarding these claims because plaintiffs granted a security interest to defendant. A security interest is a lien created by agreement. *Ottaco, Inc v Gauze*, 226 Mich App 646, 654; 574 NW2d 393 (1997) (citation and quotations omitted). Subject to exceptions, a security interest is enforceable against

[1] In regard to any claim that the foreclosure notice was defective because it listed the redemption period as six months, Salvatore clearly testified that the property was held for speculative purposes and that he was in the business of real estate investment and development. The mortgage agreements were also for commercial mortgages. Further, as the trial court noted, there was not a single structure on the property suitable for living. Plaintiffs also fail to cite any caselaw suggesting that the zoning of the property should control the determination of the redemption period. Thus, plaintiffs have failed to establish a genuine issue of material fact regarding the alleged defect in the notice of foreclosure.

the debtor if (1) value has been given, (2) the debtor has rights in the collateral or power to transfer rights in the collateral to a third party, and (3) debtor has authenticated a security agreement that describes the collateral. MCL 440.9203(2).

Further, under MCL 440.9108(1), "a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described." Reasonable identification can be accomplished through: specific listing, category, type of collateral defined in the uniform commercial code, quantity, computational or allocational formula, or any other method when the identity of the collateral is objectively determinable. MCL 440.9108(2). However, "[a] description of collateral as 'all the debtor's assets' or 'all the debtor's personal property' or using words of similar import does not reasonably identify the collateral." MCL 440.9108(3).

While plaintiffs attempt to create a genuine issue of material fact regarding defendant's possession of the equipment located on the properties, plaintiffs clearly granted defendant a security interest in this property. Rodeo Homes agreed that Tri County Bank had a security interest in "any personal property or fixtures which may now or hereafter constitute any part of the Property, in all personal property in possession of the Lender but belonging to the Mortgagor[.]" While plaintiffs argue that this should be read to include only "things affixed to the Attica Property," the security interest clearly states that it extends "any personal property *or* fixtures" that are part of the property. Likewise, Eagle Homes granted Tri County Bank a security interest in "equipment, and other personal goods of whatsoever description which may now or hereafter be located, situated or affixed on and used in connection with" the property. While plaintiffs attempt to construe this agreement as overly broad and vague, the language clearly limits the security interest to the personal property located, affixed, or used in connection with the property. Further, all the statute requires is that the language leads to a reasonably identification of the property, even if the resulting category includes a significant amount of personal property. See MCL 440.9108(1). Thus, the trial court properly found that there is no genuine issue of material fact regarding defendant's possession of the personal property.

Alternatively, summary disposition is warranted based on plaintiffs' failure to present any evidence regarding damages. Plaintiffs, however, contend that the trial court should have allowed Salvatore to testify as an expert about damages. "The evidentiary rule that governs expert testimony" is MRE 702, *Dextrom v Wexford Co*, 287 Mich App 406, 426; 789 NW2d 211 (2010), which states:

> [i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

While Salvatore averred that his knowledge of the value of used equipment was based on internet searches he performed, that is hardly the product of reliable principles and methods or sufficient facts or data. Moreover, a plaintiff must prove damages with reasonable certainty;

speculative damages, or those based upon conjecture, are not generally recoverable. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). Allowing Salvatore to testify on the complex issue of the value of used machinery, based only on unverified internet searches, would permit plaintiffs to prove damages with speculation evidence. Therefore, the trial court did not err in concluding that Salvatore was not an expert on the issue of damages.

In the alternative, plaintiffs claim that expert testimony was not even necessary on the issue of damages. However, expert testimony is appropriate when the disputed issue is not "a matter of common knowledge and observation." *Genna v Jackson*, 286 Mich App 413, 424; 781 NW2d 124 (2009) (citation and quotations omitted); see also *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 49; 436 NW2d 70 (1989). The value of used machinery is not a matter of common knowledge and observation. Absent expert testimony, allowing jurors or the court to speculate about the value of used equipment like a Grizzly thumb attachment or a Cepco scraper would permit plaintiffs to avoid their burden of actually proving damages. Thus, there was no error in finding that expert testimony was required.

II. MOTION TO AMEND ORDER

A. Standard of Review

Plaintiffs' final claim relates to their motion brought pursuant to MCR 2.612 to correct a purported clerical mistake on the order of March 15, 2010. A trial court's decision on a motion pursuant to MCR 2.612 is reviewed for an abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

B. Analysis

MCR 2.612(A) states:

> (1) Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party and after notice, if the court orders it.

Plaintiffs requested that instead of "stipulated to," the summary disposition order should state "approved as to form." While plaintiffs frame this as merely an attempt to correct a clerical error, this is not a matter of an inadvertent mistake. Rather, plaintiffs are attempting to change the language they agreed to because of a retrospective realization that it could be interpreted unfavorably. Thus, the trial court's denial of plaintiff's motion did not fall outside the range of reasonable and principled outcomes. Moreover, considering that summary disposition was properly granted, any issue regarding a potential stipulation to the summary disposition order is moot.

III. CONCLUSION

Since plaintiffs were unable to raise a genuine issue of material fact regarding their real property and personal property claims, summary disposition was properly granted. We affirm the trial court order granting summary disposition to defendant.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Michael J. Riordan