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STATE OF MICHIGAN
COURT OF APPEALS

KINGS LANE GP, INC, SJS INVESTMENTS, INC,
and EESAM ARABBO,

UNPUBLISHED
October 7, 2021

Plaintiffs/Counterdefendants-
Appellants,

v

No. 352447
Genesee Circuit Court
LC No. 15-105009-CB

KINGS LANE LIMITED DIVIDEND HOUSING
ASSOCIATION LIMITED PARTNERSHIP, PNC
MULTIFAMILY CAPITAL INSTITUTIONAL
FUND XXXI LIMITED PARTNERSHIP, PNC
BANK, NA, and COLUMBIA HOUSING SLP
CORPORATION,

Defendants/Counterplaintiffs-
Appellees.

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Plaintiffs Kings Lane GP, Inc. (Kings Lane GP), SJS Investments, Inc. (SJS Investments), and Eesam Arabbo appeal as of right, challenging the trial court’s order granting summary disposition in favor of defendants Kings Lane Limited Dividend Housing Association Limited Partnership (the Limited Partnership), PNC Multifamily Capital Institutional Fund XXXI Limited Partnership (PNC Multifamily Capital Fund), Columbia Housing SLP Corporation (Columbia Housing) (collectively “the Partnership parties”), and PNC Bank, NA (PNC Bank). For the reasons set forth in this opinion, we reverse and remand for further proceedings.

I. BACKGROUND

This case arises from the removal of Kings Lane GP as the general partner of the Limited Partnership, in which Arabbo,¹ PNC Multifamily Capital Fund, and Columbia Housing were limited partners. The purpose of the Limited Partnership was to “rehabilitate, acquire, own, operate, maintain, manage, lease, sell, mortgage, or otherwise dispose of the Project,” which consisted of the Kings Lane Apartment Complex (the property). The improvement of the property was a rehabilitation project under a United States Department of Housing and Urban Development (HUD) program. SJS Investments was the developer.

In June 2006, the parties entered into an Amended and Restated Agreement of Limited Partnership (LPA). Section 7.7(a)(i) of the LPA provided the limited partners with the right to remove the general partner and to elect a new general partner under certain enumerated circumstances. Additionally, Article XIV of the LPA provided, in pertinent part:

(a) So long as the Secretary of the [HUD] or the Secretary’s successors or assigns is the insurer or holder of the mortgage note secured by the mortgage on Kings Lane Apartments, . . . no amendment to the Certificate of Limited Partnership, as amended, or this Agreement, that results in any of the following will have any force or effect without the prior written consent of the Secretary:

* * *

(v) *A change in the General Partner of the Partnership[.]* [Emphasis added.]

In 2010, the Limited Partnership defaulted on a mortgage that had been assigned to defendant PNC Bank. An action was initiated in the trial court, but was later removed to federal court because HUD was named as a party. In 2013, the United States District Court for the Eastern District of Michigan authorized the judicial foreclosure and sale of the property. While that matter was pending, Kings Lane GP was informed that it was being removed as the general partner because of a variety of breaches of the LPA. Thereafter, the property was purchased by PNC Bank, and the sale was confirmed by the district court. Under the terms of the LPA, the Limited Partnership dissolved.

In June 2015, plaintiffs commenced the instant action. Their first-amended complaint asserted several claims, including a request for declaratory relief. With respect to the claim for declaratory relief, plaintiffs requested in relevant part that the trial court “[e]nter a declaratory judgment that . . . Kings Lane GP [had] not been removed as General Partner of Kings Lane LP.” This claim was based on allegations that “the attempted removal of . . . Kings Lane GP . . . was without proper authority, contrary to the partnership agreement, and/or otherwise not in accordance with Michigan law.”

¹ Arabbo is the president of Kings Lane GP and SJS Investments.

In 2017, the trial court granted defendants' motions for summary disposition and dismissed all of plaintiffs' claims. Plaintiffs appealed, and this Court affirmed the dismissal of the claims for tortious interference with a contract or business relationship, fraud and misrepresentation, conspiracy and concert of action, breach of fiduciary duty, and breach of contract. *Kings Lane GP, Inc v Kings Lane Ltd Dividend Housing Ass'n Ltd Partnership*, unpublished per curiam opinion of the Court of Appeals, issued December 4, 2018 (Docket No. 338967). However, this Court reversed the trial court's dismissal of the claim for declaratory relief. *Id.* at 14-16. In relevant part, this Court concluded that an actual controversy existed because defendants had not presented "any evidence that they had permission from the Secretary of HUD before removing Kings Lane GP as general partner." *Id.* at 15. Consequently, "[w]hether the removal took effect remain[ed] in question," and the matter was remanded to the trial court. *Id.* at 15-16.²

On remand, the Partnership parties and PNC Bank filed motions for summary disposition under MCR 2.116(C)(4) (lack of subject-matter jurisdiction) and (C)(10) (no genuine issue of material fact). In relevant part, defendants argued that there was no actual controversy regarding the status of the Limited Partnership because the property had been sold and the Limited Partnership had been dissolved. The Partnership parties also argued that plaintiffs' request for declaratory relief was barred by the doctrine of laches.

Plaintiffs opposed defendants' motions, arguing that an actual controversy existed because Kings Lane GP had been removed as the general partner of the Limited Partnership without the consent of the Secretary of HUD. Plaintiffs alleged that there were monetary distributions to be made according to the LPA and that they were entitled to monetary damages. Plaintiffs also argued that the doctrine of laches was inapplicable and that this Court had already decided the question of subject-matter jurisdiction and whether an "actual controversy" existed in the prior appeal. Plaintiffs moved for summary disposition in their favor under MCR 2.116(I)(2) because defendants had failed to establish that they had obtained approval from the Secretary of HUD before removing Kings Lane GP as the general partner.

After hearing oral argument, the trial court concluded that there was no actual controversy given that plaintiffs' claims for monetary damages had been dismissed and given that the Limited Partnership had been dissolved. In so holding, the trial court rejected plaintiffs' argument that this Court had previously decided this issue to the contrary. The trial court also concluded that plaintiffs' claim for declaratory relief was barred by the doctrine of laches. Thereafter, the trial court severed the counterclaims and entered an order of dismissal. This appeal followed.

III. ANALYSIS

Plaintiffs argue that the trial court erred by granting defendants' motions for summary disposition and by denying plaintiffs' motion for summary disposition. We agree in part.

² Contrary to plaintiffs' arguments on appeal, we did not hold that the trial court was "required" to determine whether defendants obtained permission from the Secretary of HUD before removing Kings Lane GP as the general partner.

A. GRANT OF DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

1. LACK OF ACTUAL CONTROVERSY

Plaintiffs argue that the trial court erred by concluding that the undisputed evidence established that an actual controversy did not exist. We agree.

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Buhl v City of Oak Park*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 160355); slip op at 3. MCR 2.116(C)(4) provides that summary disposition may be granted if a court "lacks jurisdiction of the subject matter." In *Meisner Law Group, PC v Weston Downs Condo Ass'n*, 321 Mich App 702, 714; 909 NW2d 890 (2017), this Court explained:

A motion under Subrule (C)(4) may be supported or opposed by affidavits, depositions, admissions, or other documentary evidence. MCR 2.116(G)(2). When affidavits, depositions, admissions, or other documentary evidence are submitted with a motion under MCR 2.116(C)(4), they "must be considered by the court." MCR 2.116(G)(5). So, when reviewing a motion for summary disposition brought under MCR 2.116(C)(4) that asserts the court lacks subject-matter jurisdiction, the court must determine whether the pleadings demonstrate that the defendant is entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.

The court rule governing a trial court's authority to enter a declaratory judgment, MCR 2.605, provides, in pertinent part:

(A) Power to Enter Declaratory Judgment.

(1) 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. [Emphasis added.]

As stated in *Burton-Harris v Wayne Co Clerk*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 353999); slip op at 11 (citation omitted), "[t]he purpose of a declaratory judgment is to definitively declare the parties' rights and duties, to guide their future conduct and relations, and to preserve their legal rights." "[A]n 'actual controversy' exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights." *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 225; 934 NW2d 713 (2019). "In the absence of an actual controversy, the trial court lacks subject-matter jurisdiction to enter a declaratory judgment." *Leemreis v Sherman Twp*, 273 Mich App 691, 703; 731 NW2d 787 (2007).

In the prior appeal, this Court held that "an actual controversy" existed under MCR 2.605(A)(1) because a genuine issue of material fact existed as to whether Kings Lane GP was properly removed as the general partner under the terms of the LPA. This Court stated that § 7.7 of the LPA allowed the limited partners to remove Kings Lane GP as the general partner under certain enumerated circumstances and that plaintiffs did not dispute "that they failed to pay

obligations as due and allowed a construction lien to be recorded against the property in 2008, [which was] a breach of the project documents.” *Kings Lane GP*, unpub op at 15. However, this Court further stated that Article XIV of the LPA restricted the limited partners from removing Kings Lane GP as the general partner without the consent of the Secretary of HUD and that defendants had “not presented . . . any evidence that they had permission from the Secretary of HUD before removing Kings Lane GP as general partner.” *Id.* at 15. Thus, this Court concluded that “[w]hether the removal took effect remains in question” and remanded the case for further proceedings. *Id.* at 15-16.

Under the law-of-the-case doctrine, a ruling by an appellate court on a specific issue will bind the appellate court and all lower courts on that same issue in the same case. *Lenawee Co v Wagley*, 301 Mich App 134, 149; 836 NW2d 193 (2013). The purpose of the doctrine is to “ ‘maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.’ ” *Co of Ingham v Mich Co Rd Comm Self-Ins Pool*, 329 Mich App 295, 303; 942 NW2d 85 (2019), quoting *Bennett v Bennett*, 197 Mich App 497, 499-500; 496 NW2d 353 (1992). The doctrine “applies only to questions actually decided in the prior decision and to those questions necessary to the court’s prior determination.” *Farish v Dep’t of Talent & Economic Dev*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350866); slip op at 9 (citation omitted), lv pending; see also *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000) (the “[l]aw of the case applies . . . to issues actually decided, either implicitly or explicitly, in the prior appeal”).

While the trial court acknowledged that it was bound by this Court’s holding that a question of fact remained concerning whether Kings Lane GP was properly removed as general partner under the terms of the LPA, the trial court concluded that this Court had not considered the arguments raised by defendants on remand. Specifically, the trial court concluded, in relevant part, that it was proper to dismiss plaintiffs’ claim for declaratory relief because all of plaintiffs’ claims concerning monetary damages had been dismissed. However, this ruling ignores the plain language of MCR 2.605(A)(1), which clearly provides that a court can grant declaratory relief “whether or not other relief is or could be sought or granted.” The trial court therefore erred by focusing on whether plaintiffs would be able to obtain monetary relief in relation to their claim for declaratory relief.

Additionally, as argued by plaintiffs, the issue of whether Kings Lane GP’s removal was valid and in conformity with the LPA is an issue that could have legal and financial repercussions for Kings Lane GP. Indeed, the amended complaint alleges that the Partnership parties had filed counterclaims against plaintiffs. Those claims are still pending.³ Because some of the claims against Kings Lane GP are based on its alleged failure to comply with terms of the LPA following its removal as general partner of the Limited Partnership, the validity of those claims and the availability of monetary relief could be impacted by a determination that Kings Lane GP was not properly removed as the general partner. Because such a determination is necessary to decide “the

³ The trial court stayed proceedings in relation to the counterclaims pending the outcome of this appeal.

rights and other legal relations” of plaintiffs and the limited partners, the trial court erred by concluding that an actual controversy did not exist under MCR 2.605(A)(1).

2. DOCTRINE OF LACHES

Plaintiffs next argue that the trial court erred by dismissing the claim based on the doctrine of laches. We agree.

The Partnership parties moved for summary disposition under MCR 2.116(C)(10) in relation to their argument concerning laches. In *Buhl*, ___ Mich at ___; slip op at 3-4, our Supreme Court explained:

When reviewing a motion brought under MCR 2.116(C)(10), “a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion.” Summary disposition is appropriate when no genuine issues of material fact exist. “A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.” [Citations omitted.]

This Court reviews de novo a trial court’s decision to apply equitable doctrines such as laches. *Knight v Northpointe Bank*, 300 Mich App 109, 113; 832 NW2d 439 (2013).

The doctrine of laches is the equitable counterpart to the statute of limitations. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008). It is primarily based on circumstances that render inequitable the granting of relief to a dilatory plaintiff. *Attorney General v PowerPick Player’s Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). Three elements are required for laches to apply: (1) the passage of time; (2) a lack of due diligence; and (3) resulting prejudice. *Bayberry Group, Inc v Crystal Beach Condo Ass’n*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 349378); slip op at 13. “Prejudice” involves “a change in condition that would make it inequitable to enforce the claim against the defendant.” *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004). “It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches.” *City of Troy v Papadelis (On Remand)*, 226 Mich App 90, 97; 572 NW2d 246 (1997) (quotation marks and citation omitted). The party asserting the application of laches has the burden of proving that the opposing party’s lack of diligence prejudiced the moving party sufficiently to warrant application of the doctrine of laches. *Bayberry*, ___ Mich App at ___; slip op at 13. Each case must be determined on its own particular facts. *Yankee Springs Twp*, 264 Mich App at 613, n 1.

Kings Lane GP was removed as the general partner of the Limited Partnership on April 30, 2013. Although *plaintiffs* did not explicitly raise the issue of whether the removal was proper until they filed the instant action in June 2015, the Limited Partnership and Columbia Housing raised the issue in October 2013 when they filed cross-claims against plaintiffs in the federal court case. In one of the cross-claims, the Limited Partnership and Columbia Housing specifically requested that the federal court enter a declaratory judgment and “declare that Kings Lane GP was removed as general partner of the Partnership on April 30, 2013,” that Columbia Housing was named the replacement general partner, and that an event of withdrawal occurred under the terms of the LPA.

In a responsive pleading, plaintiffs argued that such relief was inappropriate. The matter was remanded to state court in June 2014 after HUD was dismissed as a party to the action. In June 2015, plaintiffs filed the instant action, and extensive litigation commenced. Thus, because the undisputed evidence did not establish that the delay was “unexcused or unexplained,” we conclude that dismissal based on the doctrine of laches was erroneous. See *Bayberry*, ___ Mich App at ___; slip op at 13.

B. DENIAL OF PLAINTIFFS’ MOTION FOR SUMMARY DISPOSITION

Plaintiffs argue that the trial court erred by denying their motion for summary disposition under MCR 2.116(I)(2) because the undisputed evidence established that the Partnership parties failed to establish that they had obtained the approval of the Secretary of HUD before removing Kings Lane GP as the general partner. MCR 2.116(I)(2) provides that when considering a motion for summary disposition, “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgement in favor of the opposing party.”

On remand, the Partnership parties and PNC Bank did not submit evidence that the Secretary of HUD approved the removal of Kings Lane GP as general partner. Nor is it clear from the record what entity was the “insurer or holder of the mortgage note” for Kings Lane Apartments when Kings Lane GP was removed as general partner. This lack of evidence may be because defendants collectively moved for summary disposition under MCR 2.116(C)(4), claiming that declaratory relief was not appropriate under MCR 2.605(A)(1) because an actual controversy did not exist. Because this Court is an error-correcting Court, *Wolfenbarger v Wright*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 350668); slip op at 13, we conclude that it would not be appropriate for this Court to decide this issue on appeal.

III. CONCLUSION

In sum, the trial court erred by granting summary disposition based on its conclusion that an actual controversy did not exist. The trial court also erred by dismissing the declaratory-relief claim based on the doctrine of laches. We decline to consider whether Kings Lane GP was properly removed as the general partner.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Elizabeth L. Gleicher

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CORPORATION,

Defendants/Counterplaintiffs-
Appellees.

Before: CAMERON, P.J., and JANSEN and GLEICHER, JJ.

JANSEN, J. (*dissenting*)

For the reasons that follow, I respectfully dissent.

The trial court properly determined that plaintiff’s claim for declaratory relief was barred by the doctrine of laches, and summary disposition was appropriate under MCR 2.116(C)(10). Therefore, I would affirm the trial court order granting the Partnership parties summary disposition.

“[A] complainant in equity must come to the court with a clean conscience, in good faith, and after acting with reasonable diligence.” *Knight v Northpointe Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). When a plaintiff fails to exercise reasonable diligence in vindicating its rights, a court sitting in equity may deny relief based on the doctrine of laches. *Id.* Timing is importation to a determination of whether laches applies; however, the doctrine is not triggered by the passage of time alone. *Id.* “Laches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff’s delay in asserting a legal right that was practicable to

assert.” *Id.* at 115. Thus, the court must consider prejudice caused by the delay in determining whether laches applies. *Id.* When the doctrine applies, the court “merely leaves the parties where it finds them.” *Id.* at 114 (quotation marks and citation omitted). “The rule that equity aids the vigilant is designed to discourage laches by making it a bar to relief and to prevent the enforcement of stale demands.” *Id.*

Here, the trial court correctly determined that the doctrine of laches applied. Kings Lane GP was removed as the general partner of the Limited Partnership on April 30, 2013. Although the Limited Partnership and Columbia Housing raised the issue of whether removal was proper in the federal case in October 2013, plaintiff did not raise this issue until June 2015, after the case was remanded to state court, and the United States Department of Housing and Urban Development (HUD) was dismissed from the action. This was in error. Plaintiff should have properly raised the claim regarding removal as general partner in 2013 when the issue was ripe, and all the proper parties were involved. See FR Civ P 18(a) (“A party asserting a claim, counterclaim, crossclaim, or third-party claim may join, as independent or alternative claims, as many claims as it has against an opposing party.”). As the trial court noted, this case has now lasted approximately 10 years, spanning three different lawsuits, demonstrating that plaintiffs did not exercise reasonable diligence in bringing this claim. The defendants were prejudiced by having to engage in years of litigation when this issue could have been resolved in the initial case. Therefore, the doctrine of laches applies, and summary disposition in favor of the Partnership parties was proper under MCR 2.116(C)(10).

Moreover, I believe that plaintiff is using a declaratory action as an improper vehicle in this instance. Declaratory judgments are governed by MCR 2.605. The purpose of a declaratory judgment is “to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants.” *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 496; 815 NW2d 132 (2012) (quotation marks, citation, and emphasis omitted). Plaintiff is attempting to revive its claims from the federal case through a declaratory action, asking the trial court to rule on this issue many years later, when the issue was ripe for discussion in the 2013 federal court case. This is in direct contravention of the purpose of a declaratory action. Thus, I further believe that summary disposition was proper.

/s/ Kathleen Jansen