

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

ALDEN STATE BANK,
a Michigan banking corporation,

Plaintiff,

v

File No. 04-8082-CK
HON. PHILIP E. RODGERS, JR.

ROSALEEN T. BORTON, RICHARD K.
BORTON,

Defendants,

and

ROSALEEN T. BORTON, RICHARD K. BORTON,

Defendants/Counter-Plaintiffs,

v

ALDEN STATE BANK,
a Michigan Corporation,

Plaintiff/Counter-Defendant,

ROSALEEN T. BORTON, RICHARD K. BORTON,

Third-Party Plaintiffs,

v

CHRISTINE T. DUNLOP, an individual
CHRISTINA L. DULL, an individual, and
BAY BREEZE DEVELOPMENT COMPANY, INC.,
a Michigan corporation,

Third-Party Defendants.

Vicki P. Kunding (P30580)
Attorney for Alden State Bank

Charles J. Taunt (P24589)
Attorney for Bortons

DECISION AND ORDER AFFECTING INTERESTS IN LAND
BY DENYING DEFENDANTS' MOTION FOR SUMMARY DISPOSITION
AND GRANTING SUMMARY DISPOSITION FOR THE PLAINTIFF

The Plaintiff Alden State Bank filed this action pursuant to MCL § 600.2932 and MCR 3.411 to quiet title to certain real property located in Antrim County, Michigan. The Plaintiff held the mortgage on a 15-unit condominium project that was being developed by Bay Breeze Development Company. In lieu of foreclosure, the Plaintiff secured a quit claim deed from Bay Breeze, conveying back to the Bank all nine (9) of the unsold units.

The Defendants own one of the condominium units in the project. They filed a Notice of Lis Pendens at Liber 714, page 356 and an Individual Claim of Interest in Real Property at Liber 720, page 696 in the records of the Register of Deeds of Antrim County claiming an interest in the subject property.

By this action, the Plaintiff Bank seeks to have the Notice of Lis Pendens and Individual Claim of Interest in Real Property declared void and of no legal effect. The Plaintiff contends that the Notice of Lis Pendens and Claim of Interest cloud title to the property and preclude it from selling the property to another developer who is interested in completing the project.¹

The Defendants filed a Motion for Summary Disposition pursuant to MCR 2.116 (C)(8). The Defendants claim that the Plaintiff has failed to state a claim upon which relief can be granted.

On March 14, 2005, the Court heard the oral arguments of counsel and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, denies the Defendants' motion and grants summary disposition for the Plaintiff.

STANDARD OF REVIEW

A motion for summary disposition pursuant to MCR 2.116(C)(8), failure to state a claim upon which relief can be granted, is tested by the pleadings alone. Only the legal basis of the complaint is examined. The factual allegations of the complaint are accepted as true, along with any inferences which may fairly be drawn therefrom. Unless the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the motion should be denied. *Mills v White Castle System, Inc*, 167 Mich App 202, 205; 421 NW2d 631 (1988). However, the mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action. *NuVision v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1988), lv den 430 Mich 875 (1988). See also, *Roberts v Pinkins*, 171 Mich App 648, 651; 430 NW2d 808 (1988).

¹ This assertion is supported by the Affidavit of Frank Campanaro, Managing Member of the prospective purchaser.

I.

Generally, a lis pendens is designed to warn persons who deal with property while it is in litigation that they are charged with notice of the rights of their vendor's antagonist and take subject to the judgment rendered in the litigation. 51 Am.Jur.2d, Lis Pendens, § 1, p. 949. Notice of lis pendens serves an important public purpose by protecting the right to litigate real property claims while protecting prospective purchasers by apprising them of disputes regarding title to the land.

In *Silberstein v Silberstein*, 252 Mich 192, 194; 233 NW 222 (1930), however, the Supreme Court held that a technically proper notice of lis pendens which meets all of the statutory requirements could be cancelled on equitable principles if, in the discretion of a trial judge, the benefits of the notice are far outweighed by the damage it causes. Following *Silberstein*, the Court in *Altman v Lansing*, 115 Mich App 495, 506-507; 321 NW2d 707 (1982), concluded that the lower court did not err in cancelling the plaintiffs' notice of lis pendens because the benefit that the plaintiffs would receive under the notice of lis pendens was too minimal in comparison to the harm that defendants would suffer. The equities favored the defendant because, if the notice was revived, progress on a project would likely come to a halt with the result that the defendants would be greatly harmed by the notice. On the other hand, it was extremely unlikely that the plaintiffs would ever succeed in their action. Accordingly, the Court concluded that the equities were entirely on the side of the defendant and canceled the plaintiffs' lis pendens.

This is precisely the situation here. If the notice of lis pendens is not canceled, the Plaintiff will be unable to sell the property to another developer who will complete the project with the result that the Plaintiff will be greatly harmed by the notice. In fact, if the Plaintiff can not sell the property and the project is not completed, everyone with an interest in the project, including the Defendants, will be harmed. Further, the Defendants do not claim title to the Plaintiff's nine (9) unsold units. The issues which were litigated involved money damages. Since title is not at issue, the lis pendens provides no appropriate notice to the public and, as already discussed, works a substantial hardship.

II.

The same is true of the Individual Claim of Interest in Real Property. The Defendants admitted at the oral arguments that they are merely trying to protect their interest in the common areas of the development as shown on the Master Plan for the development. The Master Plan is recorded in the records of the Register of Deeds of Antrim County. Therefore, the Master Plan and the Individual Claim of Interest in Real Property are duplicative and redundant. The Individual Claim of Interest in Real Property does not afford the Defendants any more protection than they already have by virtue of the fact that the Master Deed is recorded.

CONCLUSION

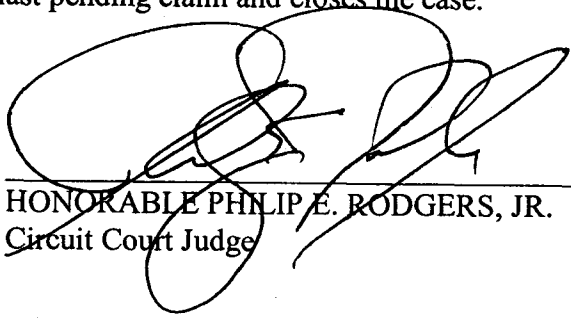
For the reasons stated herein, the Defendants' Motion for Summary Disposition is denied. Summary disposition is granted for the Plaintiff. The Defendants' Counterclaim is dismissed with prejudice.

The Notice of Lis Pendens recorded at Liber 741, page 356 and the Individual Claim of Interest in Real Property recorded at Liber 720, page 696 of the recorded of the Register of Deeds of Antrim County are hereby canceled. From the date signed below, they are void and of no legal effect. This decision and order may be recorded in the records of the Register of Deeds of Antrim County.

Each party is responsible for their own attorney fees and costs.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____

3/30/05