

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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STULBERG ROCHESTER, L.L.C.,

Plaintiff-Appellant,

v

GULF ROCHESTER II, L.L.C.,

Defendant-Appellee.

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UNPUBLISHED

August 8, 2013

No. 307188

Oakland Circuit Court

LC No. 2011-116026-CK

Before: GLEICHER, P.J., and BECKERING and SHAPIRO, JJ.

PER CURIAM.

Plaintiff Stulberg Rochester, L.L.C. (Stulberg) filed suit against defendant Gulf Rochester II, L.L.C. (Gulf II) for breaching an agreement under which Gulf II promised to share with Stulberg the proceeds of any mortgage over certain property. The circuit court dismissed Stulberg's claims because they were filed two months after the expiration of the statute of limitations for a breach of contract action. The court subsequently denied Stulberg's motion for reconsideration because Stulberg should have raised its new arguments in response to the summary disposition motion. We affirm.

**I. BACKGROUND**

On August 6, 1999, Stulberg sold three parcels of land to Gulf II's predecessor-in-interest Gulf Rochester, L.L.C. (Gulf) via land contract. The controversy in this matter revolves around a 10.13-acre plot known as "Parcel C." Gulf paid the land contract in full and received a warranty deed. This did not end the parties' relationship, however. A rider was incorporated into the land contract by reference and provided that "[t]he various agreements, rights and obligations of the parties . . . shall survive payment of the Land Contract and delivery of the Deed." The rider gave Stulberg a continuing interest in Parcel C as follows:

In the event all or any part of Parcel C is sold or in any way transferred, leased or hypothecated<sup>[1]</sup> to anyone at all . . . by Purchaser at any time in the future, Seller shall receive one-half of all amounts received then and thereafter.

Gulf had a duty to give Stulberg “reasonable advance notice” if it decided to sell, transfer, lease or hypothecate Parcel C and allow Stulberg the opportunity to be present at the closing of any such transaction. Stulberg retained a lien over all three parcels to secure the future payment required under these provisions.

On November 30, 2000, Gulf transferred the subject property to Gulf II. Gulf II, a “Tadian Company,” remained bound by the land contract because the rider “broadly defined” the purchaser “for the benefit of the Seller” as any company in which Gary Tadian or his family possessed an interest.

On November 9, 2004, Gulf II mortgaged the property to Comerica Bank, obtaining a loan advancement of approximately \$937,200. The mortgage was recorded with the Oakland County Register of Deeds on January 5, 2005. On May 5, 2007, Gulf II obtained an additional cash advance of \$84,832, secured by the same mortgage. Gulf II defaulted on its mortgage loan and on November 3, 2010, transferred the property to the bank in lieu of foreclosure. It is clear from the record that Gulf II did not notify Stulberg of any of these transactions, nor did it share the mortgage proceeds. Therefore, if the action were allowed to proceed on the merits, Stulberg likely would have a meritorious claim.

Stulberg filed suit on January 4, 2011, alleging a breach of contract. Stulberg’s complaint cited the proceeds received when the mortgage was entered, as well as the additional funds advanced to Gulf II in 2007. The complaint asserted that Gulf II transferred the property to the bank in 2010, but failed to mention that the transfer was in lieu of foreclosure. Stulberg sought to enforce the rider provision and “requested Gulf II to pay to Stulberg whatever Gulf II owes Stulberg pursuant to the Land Contract received from Comerica.”

Gulf II responded by moving for summary disposition pursuant to MCR 2.116(C)(7), asserting that the case was barred by the six-year statute of limitations for contract actions. Gulf II relied upon the November 9, 2004 date on which the mortgage was signed, not the date on which the mortgage was recorded. Stulberg retorted that the 10-year statute of limitations for mortgage actions applied. Even if the six-year statute of limitations was applicable, Stulberg argued that Gulf II was equitably estopped from seeking dismissal because it failed to notify Stulberg of the mortgage as required by the land contract rider. Notably, Stulberg did not try to avoid the statute of limitations on the ground that Gulf II received a mortgage advance in 2007, or transferred the property to the bank in 2010.

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<sup>1</sup> “Hypothecate” means “[t]o pledge property as security or collateral for a debt. Generally there is a no physical transfer of the pledged property to the lender, nor is the lender given title to the property; though he has the right to sell the pledged property upon default.” *Black’s Law Dictionary* (6<sup>th</sup> ed), p 742. To hypothecate property means to mortgage it.

The circuit court agreed with Gulf II and summarily dismissed the action in its entirety, ruling:

A mortgage is nothing more than a lien against real property granted by the owner to secure an obligation of the owner. Thus, for this case to be considered an “action founded upon a mortgage of real estate,” [Stulberg] would have to hold some type of “mortgage” on the property, i.e., a lien granted by the property’s owner to secure an obligation of the property’s owner. But because this sale was pursuant to a land contract, [Stulberg] retains ownership of the property until the contract is paid off. If so, [Stulberg] cannot be said to hold a mortgage on the property, and the claim cannot be characterized as an action founded upon a mortgage.

Therefore, the court rejected the use of the 10-year statute of limitations applicable to mortgage claims. The circuit court also rejected Stulberg’s equitable estoppel claim. Gulf II’s duty to notify Stulberg of its intent to mortgage Parcel C was contractual and, therefore, the six-year statute of limitations applied to a breach of that duty. There was no record indication that Gulf II’s conduct was designed to prevent Stulberg from acting within the statute of limitations, defeating the equitable estoppel claim.

Stulberg then sought reconsideration of the dismissal, arguing for the first time that its contractual actions for a share of the proceeds from the 2007 mortgage advance and the 2010 transfer in lieu of foreclosure were filed within the six-year statute of limitations. The circuit court denied Stulberg’s motion, noting that Stulberg mentioned the 2007 and 2010 transactions in its complaint and therefore had adequate information to raise those events in its response challenging summary disposition. This appeal followed.

## II. STANDARD OF REVIEW

We review de novo a trial court’s decision on a motion for summary disposition. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008). Where no factual dispute exists, whether a cause of action is barred by a statute of limitations is a question of law that we review de novo. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). We also review de novo the circuit court’s decision whether to apply equitable principles, such as equitable estoppel. *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). We review for an abuse of discretion the circuit court’s denial of Stulberg’s motion for reconsideration. *Luckow Estate v Luckow*, 291 Mich App 417, 423; 805 NW2d 453 (2011). An abuse of discretion occurs when a decision falls outside the range of reasonable and principled outcomes. *Id.*

## III. STATUTE OF LIMITATIONS

Stulberg challenges the circuit court’s selection of the applicable statute of limitations. MCL 600.5807(8) provides a six-year statute of limitations for general breach of contract actions. Subsection (4) on the other hand, provides a 10-year limitations period “for actions founded upon covenants in deeds and mortgages of real estate.” For the 10-year period to apply, we would have to deem the land contract and rider to be a mortgage.

A land contract and a mortgage are not synonymous.

The term land contract is commonly used in Michigan as particularly referring to agreements for the sale of an interest in real estate in which the purchase price is to be paid in installments (other than an earnest money deposit and a lump-sum payment at closing) *and no promissory note or mortgage is involved between the seller and the buyer*. [*Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999) (quotation marks and citations omitted, emphasis added).]

The parties' land contract and rider do not include the term "mortgage" anywhere within and no promissory note was involved in the transaction.

Stulberg claims that the land contract and rider were essentially a "purchase money mortgage." A purchase money mortgage is one in which the lender supplies the money for a borrower to purchase property and the debtor takes title to the property as part of the transaction. *Graves v Amer Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 613-614; 677 NW2d 829 (2004). Gulf took equitable title and all rights of ownership to the property when it signed the land contract. *Id.* at 616. But Stulberg did not have a mortgage interest as the land contract vendor. "The vendor's legal title . . . is only a trust coupled with an interest by way of security for a debt . . . . *It represents but an ordinary money debt, secured by the contract.*" *Id.* at 616-617 (quotation marks and citations omitted, emphasis added). Stulberg selectively quotes *Rothenberg v Follman*, 19 Mich App 383, 387 n 4; 172 NW2d 845 (1969), for the proposition that a purchase money mortgage and a land contract are functionally equivalent. That same footnote supports our conclusion that the law governing land contracts is "largely shaped by contract principles." *Id.* at 388 n 4. The presence of additional contract-based rights and obligations extending beyond the mere purchase of property by land contract further supports our reliance on the general contract-action statute of limitations.

In the rider, Stulberg retained a lien on the property to secure payment of its portion of the proceeds from a sale, lease or hypothecation of the property. Stulberg suggests that this lien makes its interest more akin to a mortgage. A lien in real property also is not synonymous with a mortgage.

In equity, a mortgage is sometimes called a lien for a debt, and so it is, and something more: *it is a transfer of the property itself, as security for the debt*: it is a qualified estate and security. It is called a lien only in a loose and general sense . . . ." [*Mundy v Monroe*, 1 Mich 68, 72 (1848) (emphasis added).]

The mere establishment of a lien is insufficient to categorize a transaction as a mortgage. And the lien in this case was not taken as a transfer of property to secure a debt. Rather, the rider provided that if Gulf II later sold or encumbered Parcel C and received proceeds in excess of the purchase price paid by Gulf, then Gulf II would be bound to share those proceeds with Stulberg. This provision is a promise to share future proceeds, not a promise to pay a debt. This promise of future action upon a condition precedent was a contract, not a mortgage.

Stulberg's claims, therefore, were based on a contract, not a mortgage. Stulberg did not bring its breach of contract action within the six-year statute of limitations. A contract claim accrues at the time the wrong is committed. MCL 600.5827; see *Cushman v Avis*, 28 Mich App 370, 373; 184 NW2d 294 (1970). The wrong in this case was committed on November 9, 2004, when the Comerica mortgage was executed without giving Stulberg the prerequisite notice. Stulberg was required to file its contract action by November 9, 2010, and its January 4, 2011 complaint was filed two months too late.

#### IV. EQUITABLE ESTOPPEL

Stulberg argues that Gulf II's failure to notify it of the mortgage merits equitable relief from the statute of limitations. Specifically, Stulberg claims that Gulf II concealed that it entered the mortgage with Comerica. Accordingly, the statute of limitations should have begun to run on January 5, 2005, when the mortgage was filed and became part of the public record.

"A statutory limitations period represents a legislative determination of that reasonable period of time that a claimant will be given in which to file an action." *Lothian v Detriot*, 414 Mich 160, 165; 324 NW2d 9 (1982). "[T]he doctrine of equitable estoppel is a judicially created exception to the general rule that statutes of limitation run without interruption." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). The doctrine of equitable estoppel is a doctrine of waiver which "serves to extend the applicable statute of limitations — by precluding the defendant from raising the bar of the statute." *Huhtala v Travelers Ins Co*, 401 Mich 118, 132-133; 257 NW2d 640 (1977).

For equitable estoppel to apply, plaintiff must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced." [*McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).]

The standard was stated differently by the Supreme Court in *Lothian*, 414 Mich at 177: to warrant the imposition of estoppel, a plaintiff must establish "that there has been a false representation or concealment of material fact, coupled with an expectation that the other party will rely upon this conduct, and knowledge of the actual facts on the part of the representing or concealing party."

Courts must be reluctant to apply the principle of equitable estoppel, limiting its use to those cases in which the defendant's "conduct [was] clearly designed to induce the plaintiff to refrain from bringing action within the period fixed by statute." *Id.* (quotation marks and citation omitted). In *Klass v Detroit*, 129 Mich 35, 39; 88 NW 204 (1901), the Supreme Court noted that equitable estoppel should be limited to cases "involving an intentional or negligent deception." Equitable estoppel should only apply when the defendant "is responsible for deceiving the plaintiff, and inducing him to postpone action." *Id.* at 39-40. The requirement that an action be filed within the applicable statute of limitations can be avoided if the defendant waives it or causes the late filing "by concealment or by fraud." *Hughes v Detroit*, 336 Mich 457, 463; 58 NW2d 144 (1953) (quotation marks and citation omitted).

First and foremost, we note that the notification provision in the land contract rider is itself a contractual duty, the breach of which results in an actionable claim subject to the six-year statute of limitations. Such a claim would therefore be tardy.

Moreover, Stulberg failed to present any evidence or make any averment beyond a bare assertion that Gulf II's actions rose to the level requiring the application of equitable principles to avoid legal standards. Stulberg contends that Gulf II had a contractual duty under the rider to give it reasonable notice in advance of entering the mortgage. The failure to give the required notice amounts to concealment sufficient to waive Gulf II's right to raise the statute of limitations in Stulberg's estimation. Stulberg has cited no malice or bad faith on Gulf II's part. Stulberg has made no allegations relating to Gulf II's intent or motives. It is possible that Gulf II's representatives handling the Comerica mortgage transaction were ignorant that the mortgage was a "hypothecation" that triggered the notification provision. Whatever Gulf II's intent, Stulberg failed to overcome Gulf II's well-supported motion for summary disposition on this ground.

## V. MOTION FOR RECONSIDERATION

Finally, Stulberg alleges that the circuit court improperly denied its motion for reconsideration based on its argument that the 2007 and 2010 transactions were within the statute of limitations. To merit a court's reconsideration, "[t]he moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3). As a general rule, a court does not abuse its discretion when it rejects a motion for reconsideration based on grounds that could have been raised in response to the summary disposition motion. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Stulberg asserts that the circuit court improperly dismissed its entire complaint when there remained claims of breach that were not statutorily time barred—the 2007 loan advance and the 2010 deed in lieu of foreclosure. In its summary disposition motion, Gulf II treated the 2007 and 2010 events as part and parcel of the underlying 2004 mortgage agreement. Stulberg did not challenge the summary disposition motion on the ground that the 2007 and 2010 events were within the statute of limitations. It was Stulberg's obligation to raise this issue in a timely manner. Stulberg failed to do so and the circuit court was not required "to scour the lower court record in search of a basis for denying the moving party's motion." *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 377; 775 NW2d 618 (2009). Once the proceedings moved beyond the summary disposition phase, the circuit court was not required to consider additional challenges that were carelessly omitted in prior pleadings. The court therefore acted within its discretion in denying the motion for reconsideration.

Although the circuit court commented on the merits of the underlying claims and Stulberg challenges the accuracy of those comments, we decline to review this issue further. The circuit court denied the motion for reconsideration because Stulberg's challenges should have and could have been raised in response to Gulf II's summary disposition motion. Any consideration of the merits of these arguments would be dicta.

Affirmed.

/s/ Elizabeth L. Gleicher  
/s/ Jane M. Beckering