STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

SANDS OF ELK RAPIDS CONDOMINIUM
ASSOCIATION, a/k/a Sands of Elk Rapids,
a Michigan Non-Profit Corporation,

Plaintiff,

v

File No. 06-8233-CK
HON. PHILIP E. RODGERS, JR.

SANDS OF ELK RAPIDS LIMITED
PARTNERSHIP, a Michigan Limited
Partnership, LEONARD HERMAN,
WANIGAN CORPORATION, a Michigan
Corporation, and GORDON L. CONVERSE,

Defendants.

_________________________________/

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Attorney for Plaintiff

Andrew F. Valenti (P21693)
Attorney for Defendants Wanigan and Converse

Lee C. Patton (P26025)
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DECISION AND ORDER REGARDING DEFENDANTS'
MOTIONS FOR SUMMARY DISPOSITION, THIRD PARTY
DEFENDANTS' JOINDER IN DEFENDANTS' MOTION AND
DEFENDANTS' MOTION FOR MCR 2.114 SANCTIONS

The Plaintiff's claims arise out of the alleged faulty design and construction of The Sands of Elk Rapids Condominiums. Defendants Sands of Elk Rapids Limited Partnership and Leonard Herman filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8). Third-Party Defendants Clark, Walter, Sirrine Architects and William Sirrine joined in the motion and requested dismissal of the Third-Party claims on the same basis. Defendants Wanigan Corporation and Gordon Converse also filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (8).

On November 20, 2006, the Court heard the arguments of counsel and granted the motion as to Defendants Sands of Elk Rapids Limited Partnership and Leonard Herman. The Court took the other motions under advisement and gave the other Defendants and Third-Party Defendants additional time to respond to the Plaintiff's late brief in opposition to the motions.[1] This additional time has now expired.

The Court has reviewed the briefs, dispenses with further oral argument, pursuant to MCR 2.119(E)(3), and issues this written decision and order granting the motions for summary disposition, dismissing the case with prejudice and sanctioning Plaintiff's counsel for violating MCR 2.114.

In response to the Defendants' motions for summary disposition, the Plaintiff argued that the statute of limitations in the Michigan Condominium Act, MCL 559.276, rather than MCL 600.5839 applied and, therefore, its claims were not time-barred. In addition, the Plaintiff argued alternatively that the Fraudulent Transfer Act applied and that it is entitled to relief against Wanigan under the property management contract. In its subsequent response to the Defendants' briefs, the Plaintiff conceded that the Court's ruling grounded in the idea that the claims against Defendant Leonard Herman were "arising out of the defective and unsafe conditions of an improvement to real property" that are time-barred by MCL 600.5839 applies equally to the claims alleged in Counts II, III and IV against other Defendants. Therefore, summary disposition on Counts II, III and IV is granted in favor of the Defendants and these Counts are dismissed with prejudice.

In response to the motions for summary disposition as to Counts VI, VII and X, the Plaintiff claims that there is no lawful basis for dismissal pursuant to MCR 2.116(C)(7) or (8). The Plaintiff argues that Counts VI and VII are not premised upon Defendant Converse's role as a "contractor," but instead are based upon his status as the property manager pursuant to the property management contract.

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[1] A Stipulated Order of Dismissal relative to the cross-complaint and third-party complaint was entered on December 6, 2006. Therefore the Court will not address these complaints here.

The Court has reviewed the Plaintiff's pleadings. The claims against Wanigan are for his failure to discover and disclose defective and unsafe conditions of an improvement to real property when he was the property manager in 2004. These are the same alleged defective and unsafe conditions of an improvement to real property that were the basis for all of the Plaintiff's claims. While MCL 600.5839 does not apply to property managers, it does apply to the "defective and unsafe conditions of an improvement to real property." Allowing the Plaintiff to bootstrap a cause of action against the contractor by suing him as the property manager would defeat the purpose of MCL 600.5839.

This case clearly illustrates the Legislative purpose for enacting MCL 600.5839. As the Court said in *Citizens Ins Co v Scholz*, 268 Mich App 659, 671-672; 709 NW2d 164 (2005):

> The statute of repose, MCL 600.5839, was specifically enacted to protect architects and engineers from "latent defect" claims that often arose many years after an improvement to real property was completed. However, the evolving case law has drawn no distinction between "latent defect" cases and other actions seeking recovery for construction-related negligence. Moreover, nearly two decades after the enactment of the statute of repose, the Legislature amended the general statute of limitations to expressly state that all actions against contractors based on an improvement to real property were governed by § 5839. MCL 600.5805(14). Although the "defective and unsafe condition" language of § 5839(1) more specifically addresses the statute's original purpose, case law and the Legislature's subsequent amendment of MCL 600.5805 leave no logical ground for excluding actions based on construction activities from the coverage of § 5839(1).

In *Witherspoon v Guilford*, 203 Mich App 240; 511 NW2d 720 (1994), the Court correctly recognized that the current MCL 600.5805(14) and MCL 600.5839 "set forth an emphatic legislative intent to protect architects, engineers, and contractors from stale claims." In *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36; 709 NW2d 589 (2006), our Supreme Court found that there was no evidence that through the enactment of MCL 600.5805(14) the Legislature intended MCL 600.5839(1) to merely serve as a statute of repose. The Court held that "[r]egarding which period of limitations applies to renovations to real property and the liability of a state-architect who furnished the design for the renovations, there is no ambiguity in the language of either MCL 600.5805(14) or MCL 600.5839(1). MCL 600.5805(14) unambiguously provides that '[t]he period of limitations for an action against a state-licensed architect [engineer or contractor] . . . shall be as provided in section 5839.'" *Id* at 44-45.

In conclusion, all of the Plaintiff's claims are time-barred by MCL 600.5839 because they were brought against architects, engineers and contractors based on "defective and unsafe conditions of an improvement to real property" "more than 10 years after the time of occupancy of the completed improvement, use, or acceptance of the improvement." Therefore, summary disposition as to Counts VI and VII should be and hereby is granted in favor of Defendant Wanigan and these counts are also dismissed with prejudice.

The Plaintiff has agreed to voluntarily dismiss Count X without prejudice, but seeks leave to amend its complaint to cure any perceived defect, pursuant to MCR 2.116(I)(5). Count X alleges fraudulent transfers and constructive fraud. MCL 566.11defines a "creditor" as "a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." MCL 566.20 grants a "creditor whose claim has not matured" a list of specific remedies. Discussing the definition of a creditor under the UFCA, the Court in *Churchill v Palmer*, 57 Mich App 210, 214; 226 NW2d 60 (1974), noted that "[o]ne with a tort claim is a creditor from the date of the tort; any liabilities are considered as existing from the date the cause of action arose." According to the rule set forth in *Churchill, supra* at 215, an action can be brought under the UFCA "prior to the rendering of a judgment in a preceding action."

In this particular case, the Court has granted summary disposition in favor of the Defendants dismissing all of the Plaintiff's claims. Thus, by definition, the Plaintiff cannot be a "creditor" of the Defendants under the UFCA. Accordingly, summary disposition on Count X should be and hereby is granted in favor of the Defendants. Count X is dismissed with prejudice. Granting the Plaintiff leave to amend would be futile and is, therefore, denied.

MCR 2.114 SANCTIONS

MCR 2.114 provides, in pertinent part, as follows:

(C) Signature.

> (1) Requirement. Every document of a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the document.
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> (2) Failure to Sign. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party.

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
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> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
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> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Plaintiff's counsel commenced this action on May 4, 2006 by signing and filing an original complaint. By signing the complaint he violated MCR 2.114(D)(2). The complaint was not warranted by existing law. MCL 600.5839 clearly and unambiguously barred Plaintiff from pursuing its claims.

In addition, Plaintiff's counsel made frivolous and unwarranted arguments in opposition to the Defendants' motions for summary disposition in a signed pleading and before the Court. For example, counsel's argument that Plaintiff's claims were viable under MCL 559.276 was absurd. MCL 556.276 clearly states that it "applies only to condominium projects established on or after the effective date of the amendatory act" which was January 2, 2001 and the condominium project at issue in this case was established more than 10 years before the effective date of the amendment.

As a result of Plaintiff's counsel signing and filing unwarranted pleadings that were not well grounded in fact or warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; the Defendants incurred expenses, including reasonable attorney fees. They are entitled to recover those expenses as a sanction pursuant to MCR 2.114(E).

The Defendants Sands of Elk Rapids Limited Partnership and Herman filed copies of the counsels' billing statements and affidavits supporting that the fees are accurate, necessarily incurred and reasonable.

The controlling criterion for awarding attorney fees is "reasonableness." The guidelines for determining "reasonableness" were set forth in *Crawley v Schick*, 48 Mich App 728, 737; 211 NW2d 217 (1973). The *Crawley* panel noted that there is no precise formula for computing the reasonableness of an attorney's fee, but said that factors to be considered are:

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client. See generally 3 Michigan Law & Practice, Attorneys and Counselors, § 44, p 275, and Disciplinary Rule 2-106(B) of the Code of Professional Responsibility and Ethics.

See also *Liddell v DAIIE*, 102 Mich App 636, 652; 302 NW2d 260 (1981).

The Court has reviewed the billing statements and affidavits submitted by Defendants Sands of Elk Rapids Limited Partnership and Herman. The Court finds that the attorneys are highly experienced in the law and litigation, the hourly rate charged was reasonable, and that the amount of time invested was reasonable. The Court notes that the attorneys obtained complete relief for their clients. The Court further notes that the Plaintiff did not contest the accuracy of the calculations upon which Attorney Bishop's request for attorney's fees was based. The only objection was to the fees requested by Attorney Bishop's predecessor on the case, Attorney Bankey, on the basis that Plaintiff's counsel had not received detailed billings that would establish a claim for her fees. Defendants' counsel has since provided Plaintiff's counsel with support for Bankey's fees and Plaintiff has made no further objection. Therefore, the Court will sign Defendants Sands of Elk Rapids Limited Partnership and Herman's request for attorney fees in the amount of $13,844.15.[2]

Defendants Wanigan and Converse shall have 14 days from the date of this decision and order to file and serve their requests for expenses, including reasonable attorney fees, with supporting affidavits and billing statements. Failure to do so shall be deemed a waiver of any

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[2] The Plaintiff has had an opportunity to respond to Defendants Sands of Elk Rapids Limited Partnership and Herman's request for expenses. Its objections are overruled.

claim they might have to sanctions. The Plaintiff shall file and serve specific objections, if any, within 21 days of the date of this decision and order.

IT IS SO ORDERED.

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

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HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: ________________________________