STATE OF MICHIGAN

COURT OF APPEALS

NORMAN FORGE and NMF, INC.,

Plaintiffs/Counter-Defendants/Appellants,

v

LEONARD SMITH and DIANE SMITH,

Defendants/Counter-Plaintiffs/Appellees,

and

THOMAS FABER,

Defendant-Appellee,

and

HARRY KIEF, JOSEPH ASCIONE and JERRY ASCIONE,

Defendants.

UNPUBLISHED
September 17, 1996

No. 177588
LC No. 91-116241 CH

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

PER CURIAM.

Plaintiffs, Norman Forge and NMF, Inc., appeal as of right from the trial court's order granting defendants Leonard Smith, Diane Smith, and Thomas Faber judgment notwithstanding the verdict (JNOV) on plaintiffs' claim of interference with easement rights. Plaintiffs also appeal the trial court's dismissal of their claim of innocent misrepresentation. We affirm.

I

*Circuit judge , sitting on the Court of Appeals by assignment.

Plaintiff, Norman Forge, brought suit against defendants Leonard Smith, Diane Smith, Thomas Faber, Harry Kief, Joseph Ascione, and Jerry Ascione, seeking declaratory relief to enforce easement rights to a parking lot adjacent to property plaintiff leased from defendants Smiths and Faber. Plaintiff also sought damages for breach of an easement agreement, for innocent misrepresentation, and for breach of a construction contract. The Smiths counterclaimed for damages related to the unpaid portion of a related building contract with Forge. Thereafter, plaintiff filed an amended complaint adding claims of contract reformation as to defendants Smiths and Faber, and a claim of breach of construction contract against defendant Leonard Smith only. The court granted a defense motion to add NMF, Inc., as a plaintiff.

Diane Smith, her husband Leonard Smith, and her brother Thomas Faber, were co-owners of six lots. In June of 1986, Forge entered into a twenty-five-year lease agreement with the Smiths and Faber for a portion of this real property described as lots 22, 23, and 24 located on Ford Road in the City of Detroit.[1] The lease agreement provided that Forge was to construct a building on the property, at his expense, and was to contract with Leonard Smith for its construction. On June 13, 1986, Forge entered into a building contract with Leonard Smith for the construction of Forge's proposed restaurant and bar. At the time Forge entered into the lease, lots 19, 20, and 21, also owned by the Smiths and Faber, were leased to Sushell Bery who operated a tune-up franchise on lots 19 and 20. Lot 21 was vacant and used for ingress and egress by Bery's customers.

Forge opened a bar and grill in December of 1987. Forge's customers parked on lot 21 for approximately the next 3 ½ years. Bery then vacated the premises and assigned his lease to defendants Joseph Ascione, Jerry Ascione, and Harry Kief to operate a car repair business. As part of the assigned lease agreement, the Smiths and Faber agreed to block off lot 21 so that Forge's customers could no longer park in lot 21. In approximately June of 1991, the Smiths and Faber began installing bumper curbs to block access to lot 21. Forge then filed the aforementioned lawsuit.

At the close of plaintiffs' case in chief, the court granted a directed verdict to the Asciones and Kief and denied plaintiffs' claim for equitable relief. The case proceeded on plaintiffs' money damages claims against the Smiths and Faber. After both parties rested, the trial court ruled that plaintiffs' theories of innocent misrepresentation and easement by implication or necessity could not be submitted to the jury. The court instructed the jury only on plaintiffs' claims of express easement, and on the Smiths' counterclaim for breach of a construction contract.

The jury found that NMF, Inc., had acquired easements rights to lot 21 by express grant, and that defendants were liable in the amount of $505,517 for interfering with that right. The jury also found that Leonard Smith was liable to Forge for breach of contract in the amount of $98,470, but that Forge was not liable for breach of the construction contract. The Smiths and Faber brought a motion for JNOV or for a new trial. The trial court issued a written opinion granting defendants' motion for JNOV as to the damage award for the interference with easement claim. Plaintiffs' breach of contract judgment and the no cause of action verdict on Leonard Smith's counterclaim were unaffected by the court's ruling.

II

A

In determining whether to grant JNOV, the trial court is to examine the testimony and all legitimate inferences that may be drawn from the evidence in a light most favorable to the nonmoving party. *Knight v Gulf & Western*, 196 Mich App 119, 128; 492 NW2d 761 (1992). If the evidence was insufficient to establish a prima facie case, such a motion should be granted since reasonable persons would agree there is an essential failure of proof. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). A court should grant JNOV where the evidence was insufficient to create a jury question. *Bordeaux v Celotex Corp*, 203 Mich App 158, 166; 511 NW2d 899 (1993). One line of authority holds that a trial court's decision is reviewed for abuse of discretion. See, e.g., *Rasmussen v Louisville Ladder, Inc*, 211 Mich App 541, 545; 536 NW2d 221 (1995); *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995); *Rice v ISI, Mfg, Inc*, 207 Mich App 634, 636; 525 NW2d 533 (1994). Another line of authority holds that a trial court's decision is reviewed de novo. See, e.g., *Haberkorn v Chrysler Corp*, 210 Mich App 354, 364; 533 NW2d 373 (1995); *Dep't of Transportation v McNabb*, 204 Mich App 674; 516 NW2d 83 (1994). We uphold the trial court under either standard.

Defendants relied upon a statute of frauds defense at trial, arguing that the written lease agreement's failure to include lot 21 made plaintiffs' claim for easement rights to lot 21 unenforceable due to the lack of a signed conveyance. Plaintiffs attempted to overcome this defense by arguing (1) that the combination of several writings was sufficient to satisfy the signed writing necessary for the grant of an express easement under the statute of frauds, and (2) plaintiffs' acts of striping lot 21 for parking spaces and placing parking berms on the lot constituted partial performance sufficient to overcome this defense.

In granting defendants' motion for JNOV, the trial court concluded that the jury should not have been allowed to consider either of the above theories because, as a matter of law, the statute of frauds barred enforcement of any agreement between the parties. We agree with the trial court's conclusion, and find that plaintiffs failed to present sufficient evidence to create a jury question regarding the statute of frauds defense.

B

Michigan's general statutes of frauds, MCL 566.106; MSA 26.906 and MCL 566.108; MSA 26.908, are controlling and provide in pertinent part:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party

> creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing. [MCL 566.106; MSA 26.906.]
>
> Every contract for the leasing for a longer period than 1 year, or for sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person there unto by him lawfully authorized in writing. [MCL 566.108; MSA 29.908.]

To satisfy the statute of frauds, a writing transferring an interest in land must be certain and definite with regard to the parties, property, consideration, premises, and time of performance. *McFadden v Imus,* 192 Mich App 629, 633; 481 NW2d 812 (1992). The absence of a signature by a co-owner of property renders a contract for the conveyance of land void under the statute. *Slater Management Corp v Nash,* 212 Mich App 30, 32-33; 536 NW2d 843 (1995). The writing necessary to satisfy the statute of frauds may consist of a combination of writings. *Goslin v Goslin,* 369 Mich 372, 375-376; 120 NW2d 242 (1963).

The lease allowed plaintiff to use lots 22, 23, and 24 but did not allow use of lot 21. Paragraphs 30 and 32 of the lease make reference to the agreement between Leonard Smith and Forge for construction of Forge's restaurant, and provide that the plans for the same shall be approved by defendants:

> 30. Tenant acknowledges that the construction of a building on said premises shall be made by LEONARD SMITH and paid for solely by Tenant and all plans and specifications for same shall be approved in writing by Landlord and paid for by Tenant. Tenant shall have the complete control over the operation, management and maintenance of said building during the term of this Lease.
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> * * *
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> 32. Tenant shall present to Leonard Smith plans and specifications approved by Tenant and Landlord within ____ days from the date of execution of this lease, and Tenant shall obtain all necessary building permits and Leonard Smith agrees to complete construction of said building within five months after building permits are delivered to him, barring any delays not within his control, such as strikes, acts of God, etc.

Leonard Smith apparently approved the plans because he referred to them in two applications for building permits, which he signed and submitted to the city. Paragraphs 30 and 32 of the lease, which was signed by all of the parties, made reference to the building contract and construction plans. The building contract and construction plans, in turn, made reference to lot 21, as did the decision from the City of Detroit Zoning Board and Board of Appeals, which granted Leonard Smith's application to build the restaurant.

Plaintiffs argued below that because the lease incorporated both the building contract and the construction plans, which Leonard Smith solely acted upon, it empowered Leonard Smith to act as agent for Diane Smith and Faber. Plaintiffs concluded that if such an agency relationship existed, the jury properly could have considered the combination of writings submitted by plaintiffs (the original lease agreement, building contract, applications for building permits, related site plans, and zoning board documents) in order to satisfy the statute of frauds. We disagree.

The lease did not grant plaintiffs any right to use lot 21. Plaintiffs cannot rely on the mentioning of lot 21 in the plans because the lease specifically stated that the plans were to be approved in writing by the Landlord (owners) and they were not. There is no evidence that Diane Smith or Thomas Faber approved the plans in writing as required under the lease. The absence of a co-owner's signature is fatal. *Slater Management Corp*, *supra*. Further, plaintiffs also cannot claim that Leonard Smith's apparent approval of the plans was binding on co-owners Diane Smith and Thomas Faber as there was no writing authorizing Leonard Smith to act on their behalf in this regard. MCL 566.106; MSA 29.906; MCL 566.108; MSA 29.908.

C

The trial court also found that because the construction plans, the only written evidence concerning plaintiffs' use of lot 21 for parking, did not indicate the extent of that use, the alleged easement was not certain and definite enough to satisfy the statute of frauds. Apparently, the trial court believed that, because the exact number and configuration of parking spaces on lot 21 could not be determined pursuant to the construction plans, the alleged easement was not definite enough to overcome the statute. We find it unnecessary to reach this issue, given our conclusion that a jury question did not exist regarding plaintiffs claim that a combination of writings took the case out of the statute of frauds.

D

The trial court also rejected plaintiffs' claim that partial performance made the statute of frauds inapplicable. Plaintiffs claimed that their striping and installing parking berms on lot 21 was sufficient to create an issue of fact for the jury regarding partial performance. The trial court rejected this claim on the basis that plaintiffs' performance of constructing the bar and using lot 21 for parking was insufficient for partial performance to apply because those acts were required under the enforceable lease agreement. While plaintiffs' construction of the bar was required under the lease, the use, striping, and installation of berms in lot 21 was not. Nevertheless, we find the trial court properly found the plaintiffs' actions did not constitute partial performance, thus making the statute of frauds inapplicable.

The doctrine of partial performance has been explained as follows:

> If one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute, equity will regard the contract as removed from the operation of the statute. [*Dumas v Auto Club Ins Ass'n*, 437 Mich

521, 540; 473 NW2d 652 (1991), quoting *Guzorek v Williams*, 300 Mich 633, 638-639; 2 NW2d 796 (1942).]

First, plaintiffs did not have an oral contract with at least two of the three co-owners of the property allowing the use of lot 21. Furthermore, where a contract cannot be performed within one year, (here the alleged contract was to allow for the use of lot 21 for the length of the lease which was twenty five years) partial performance fails to negate the statute of frauds writing or signature requirements. *Dumas*, *supra* at 540-541; *Zander*, *supra* at 445.

III.

Plaintiffs also appeal the trial court's dismissal of their claim for innocent misrepresentation. After all parties had rested, the court dismissed this claim on the basis that no such cause of action was recognized in Michigan. Defendants argue that even if the court stated a wrong reason, it reached the right result. We agree.

The reason cited by the court was in error. *McMullen v Joldersma*, 174 Mich App 207, 213; 435 NW2d 428 (1988); *US Fidelity & Guaranty Co v Black*, 412 Mich 99, 116, n 8; 313 NW2d 77 (1981). Nevertheless, we agree that the court reached the correct result. Any statement Leonard Smith may have made was insufficient to bind the other defendants. A person cannot claim to reasonably rely on an oral grant of an easement given by one of several joint owners without any writing authorizing the supposed agent to make that grant. MCL 566.106; MSA 26.906. Further, plaintiffs did not prove that defendants made a misrepresentation of a past or existing fact. A promise regarding the future cannot form the basis of a misrepresentation claim. *Kamalnath v Mercy Memorial Hosp*, 194 Mich App 543, 554; 487 NW2d 499 (1992).

IV.

In summary, we find that, viewing the evidence in a light most favorable to plaintiffs, the trial court did not abuse its discretion in granting defendants' motion for JNOV. *Zander*, *supra* at 445.

Affirmed.

/s/ Clifford W. Taylor
/s/ Edward J. Grant

[1] Faber's wife, Colleen, was also named as a landlord on the lease; however, she was not named as a defendant because she died after the lease was signed and before this litigation ensued.