

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

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MICHAEL L. CRISPIN and SUSAN E.  
CRISPIN,

UNPUBLISHED  
October 4, 1996

Plaintiffs-Appellants,

v

No. 182550  
LC No. 93-066643-CK

RAYMOND J. VANKIRK and ALICE VANKIRK  
a/k/a ALICE VAUGHN,

Defendants-Appellees.

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Before: Hoekstra, P.J., and Michael J. Kelly and J.M. Graves,\* JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10), and dismissing plaintiffs' claims of nuisance, breach of contract, and fraud. We affirm.

The complaint in this case stems from plaintiffs' purchase of property from defendants that was encumbered by an easement for egress and ingress to a parcel upon which defendants resided at the time of plaintiffs' purchase. In addition, defendants agreed to a right of first refusal purchase option in favor of plaintiffs for a separate or third parcel adjoining the property purchased by plaintiffs that was also owned by defendants. Plaintiffs' complaint alleged nuisance based on the claim that defendants abused the use of the easement for the purpose of harassing plaintiffs. In addition, plaintiffs alleged breach of contract and fraud concerning the right of first refusal purchase option when title to the third parcel was conveyed to another.

First, we address plaintiffs' claim that the trial court's decision to grant summary disposition on plaintiffs' nuisance claim pursuant to MCR 2.116(C)(7)<sup>1</sup> on the basis of laches was erroneous.<sup>2</sup> Laches being an affirmative defense based in equity, our review is de novo. *Baden v General Motors Corp*, 188 Mich App 430, 438; 470 NW2d 436 (1991). The prerequisites for laches are a passage of time, prejudice to the defendant, and a lack of diligence by the plaintiff. *Torakis v Torakis*, 194 Mich App 201, 205; 486 NW2d 107 (1992). Although the length of delay in this case was not very long, we

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

agree that laches was appropriately applied by the trial court because the nature of the lawsuit was significantly changed due to the subsequent sale of defendants' property, the dismissal with prejudice from the lawsuit of the current owners, and defendant Raymond VanKirk's move to South Carolina. During the time plaintiffs failed to pursue their claim for nuisance, the relationship between the parties changed substantially and defendant Raymond VanKirk's ability to pursue the litigation was impaired. We believe these factors constituted sufficient lack of diligence and prejudice to warrant imposition of laches on plaintiffs' nuisance claim.

Regarding the property subject to a right of first refusal purchase option, plaintiffs' argue that the trial court erred in granting summary disposition on their breach of contract claim pursuant to MCR 2.116(C)(10)<sup>3</sup> because the conveyance of title to the property to defendant Raymond VanKirk's mother breached the agreement. We review the granting of summary disposition pursuant to (C)(10) de novo. *Allstate Ins v Elassal*, 203 Mich App 548, 552; 512 NW2d 856 (1994). We agree with the trial court that the conveyance to defendant Raymond VanKirk's mother did not constitute a sale subject to the right of first refusal purchase option. Looking at the evidence in a light most favorable to plaintiffs, *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), the facts establish only that the transfer was executed to secure a loan between defendants and Raymond VanKirk's mother. Basically, other than asserting that this is not the normal procedure for securing a loan, plaintiffs failed to articulate any circumstances from which to conclude that the transfer was intended for the purpose of defeating plaintiffs' right of first refusal, or for any purpose other than securing the loan as represented by defendants. And, as noted by the trial court, defendants have reacquired whatever interest was conveyed and are presently able to sell and transfer a clear title. Accordingly, plaintiffs have failed to show that a genuine issue of material fact existed. *Id.*

Next, plaintiffs argue that the trial court erred in dismissing their claims of fraud against defendant Raymond VanKirk pursuant to MCR 2.116(C)(8). We disagree. Regarding plaintiffs' claim of fraud arising from defendant Raymond VanKirk's representation that he was a real estate agent, we find that plaintiffs failed to plead four of the required six elements of fraudulent misrepresentation, making summary disposition appropriate. *Arim v General Motors Corp*, 206 Mich App 178, 195; 520 NW2d 695 (1994). Plaintiffs also claim fraud arising from defendant Raymond VanKirk's conveyance of title to the third parcel to his mother. Plaintiffs have failed to support their argument with legal authority, and we deem this argument abandoned on appeal. *Mitchell v Dahlberg*, 215 Mich App 718, 728; 547 NW2d 74 (1996).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael J. Kelly

I concur in result only.

/s/ James M. Graves, Jr.

<sup>1</sup> We note that laches is properly addressed in a motion to dismiss, and not in a (C)(7) motion for summary disposition. *Quarderer v Shiawassee Co Drain Commissioner*, 82 Mich App 692, 694; 267 NW2d 151 (1978). Because neither party raised this as an issue, we elect to ignore this procedural error and review the merits of the issue.

<sup>2</sup> It is apparent from plaintiffs' brief on appeal that plaintiffs misapprehend the trial court's application of the doctrine of laches in this case. Plaintiffs believe that laches was applied to the breach of contract and fraud counts in addition to the nuisance count. From our reading of the trial court's decision, we understand laches to have been applied to the nuisance count only and address it only in that context.

<sup>3</sup> The trial court did not specify on what basis summary disposition was granted. Because the trial court would have had to examine affidavits and documents to decide whether the disputed transfer was a sale, we assume it was granted pursuant to MCR 2.116(C)(10).