

STATE OF MICHIGAN
COURT OF APPEALS

JOHN E. THOMAS, Individually, and on behalf of S-T GROUP, INC., a Michigan corporation, and CUMBERLAND DEVELOPMENT COMPANY, a joint venture and Michigan copartnership,

UNPUBLISHED
December 3, 1996

Plaintiffs-Appellants,

v

No. 187927
LC No. 93-312283 CK

GERALDINE SHACKET, Individually and as Personal Representative for the ESTATE OF AL A. SHACKET, and as Guardian for the person of SHELDON I. SHACKET, a Legally Incapacitated Person; SHACKET DEVELOPMENTS, INC., a Michigan corporation; FENTON LAND DEVELOPMENT, INC., a Michigan corporation; EAST RIDGE INC., a Michigan corporation; FOX RIDGE INC., a Michigan corporation; and FOX POINTE BUILDERS, INC., a Michigan corporation,

Defendants-Appellees.

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Plaintiffs appeal by right from the July 10, 1995, stipulation and order of dismissal entered in Wayne Circuit Court in this contract dispute. On appeal, plaintiffs argue that the trial court erred in granting defendants' motion for partial summary disposition brought pursuant to MCR 2.116(C)(7) and in denying plaintiffs' motion for partial summary disposition brought pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part.

Plaintiffs argue that the trial court erred in granting defendants' motion for partial summary disposition because the trial court's decision was based on its erroneous finding that the statute of frauds

applied to and barred the enforcement of the contract between defendant, Al Shacket, and plaintiff, John Thomas. We agree.

Michigan's statute of frauds provisions, MCL 566.106; MSA 26.906 and MCL 566.108; MSA 26.908, require contracts which transfer an interest in land to be in writing in order to be enforced. The oral contract in question created only an interest in the options to purchase land and the profits resulting therefrom¹. Under Michigan law, an option to purchase does not create an interest in land and is not within the statute of frauds. *Hague v DeLong*, 282 Mich 330, 333; 276 NW 467 (1937); *Marina Bay Condominiums, Inc v Schlegel*, 167 Mich App 602; 423 NW2d 284 (1988). Moreover, an oral partnership agreement for the purchase and sale of options on real estate and to share in the profits derived from the sale of realty is also not within the statute of frauds. *See Koffman v Mathews*, 352 Mich 390, 394; 89 NW2d 756 (1958); *Summers v Hoffman*, 341 Mich 686, 697; 69 NW2d 198 (1955); *Mullholland v Patch*, 205 Mich 490, 491; 171 NW 4 (1919).

Because the subject matter of the oral contract in question is not the transfer of an interest in land, it does not come within the statute of frauds. Calamari & Perillo, *Contracts* (3rd ed), 19-14(5), p 797. Thus, contrary to the trial court's finding, the statute of frauds does not apply to the oral contract in question, and the absence of a writing does not bar plaintiffs' claim. Therefore, we find that the trial court erred in granting defendants' motion for partial summary disposition.

Plaintiffs also argue that the trial court erred in denying plaintiffs' motion for partial summary disposition as to their claims of conversion and breach of fiduciary duty. We disagree. The only evidence upon which plaintiffs rely to establish these claims is the testimony of John Thomas and Robert Porteous. Because the truth of plaintiffs' material factual assertions depend upon the credibility of deponents, there does exist a genuine issue of material fact in this case. *See Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). Accordingly, the trial court did not err in denying plaintiffs' motion for summary disposition.

Affirmed in part and reversed in part.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Nicholas J. Lambros

¹ Plaintiffs' contention that the oral contract in question was a contract which created an interest in the options to purchase lands and the profits therefrom was not challenged by defendants.