STATE OF MICHIGAN

COURT OF APPEALS

MAX F. VAN HURK and EDWARD J. VAN HURK,

Plaintiffs-Appellants,

v

JOHN VAN HURK,

Defendant-Appellee.

UNPUBLISHED
March 7, 1997

No. 190634
Alcona Circuit Court
LC No. 94-008960 CH

Before: Griffin, P.J., and McDonald and C. W. Johnson*, JJ.

PER CURIAM.

Plaintiffs appeal by right Alcona Circuit Judge John F. Kowalski's order granting defendant summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs initiated this action to quiet title to two parcels of property, "Parcel A" and "Parcel B." On appeal, plaintiffs argue the trial court erroneously considered both plaintiffs' and defendant's motions for summary disposition together, and that plaintiffs were entitled to summary disposition. We reverse and remand for trial.

Plaintiffs claim the trial court was required to treat the respective motions for summary disposition independently. This is a question of law, which we review de novo on appeal. *Oakland Hills Development Corp v Lueders Drainage District*, 212 Mich App 284; 537 NW2d 258 (1995). Plaintiffs claim it is not clear whether the trial court granted defendant summary disposition pursuant to MCR 2.116(I)(2), or whether the trial court considered defendant's own motion. Our review of the lower court record, however, indicates the defendant did not file his own motion for summary disposition until after the trial court denied plaintiffs' motion from the bench. There is no authority which prohibits a trial court from considering a party's motion for summary disposition after the opposing party's motion has been denied. We therefore conclude the trial court did not err in considering defendant's summary disposition, or the documentary evidence submitted in support of the motion.

Plaintiffs also argue the trial court erroneously determined which facts were disputed and which were undisputed. Because we review summary disposition motions de novo, *G & A v Nahra*, 204

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

Mich App 329; 514 NW2d 255 (1994), we need not review the trial court's determination of which facts were disputed.

We now turn to the issue of whether the trial court erred in denying plaintiffs' motion for summary disposition, or in granting defendant's motion. A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Insurance Co*, 210 Mich App 98; 532 NW2d 869 (1995). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing there is a genuine issue for trial. *Id.* This Court is liberal in finding a genuine issue of material fact. *Id.* Nonetheless, where the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, the motion is properly granted. *Id.*

At issue in this case is whether Max's execution and recording of the 1985 quitclaim deeds constituted a valid conveyance, thereby creating in defendant a legal interest as a joint tenant in Parcels A and B. Delivery of a deed is essential to pass title. *Resh v Fox*, 365 Mich 288; 112 NW2d 486 (1961). The primary object of delivery is to indicate the grantor's intent to give effect to the instrument. *Id.* The test to determine whether a delivery has taken place is whether the grantor intended to convey a present interest in the land. *Id.* The recording of a deed may, under certain circumstances, be sufficient to demonstrate delivery. *Reed v Mack*, 344 Mich 391; 73 NW2d 917 (1955). Although recording a deed does not by itself necessarily establish delivery, the recording raises a presumption of delivery. *Id.* If a grantor records a deed without the grantee's knowledge or assent, there is no delivery, because the grantee's assent is an essential element of delivery. *Gibson v Dymon*, 281 Mich 137; 274 NW 739 (1937).[1]

Because the undisputed evidence in this case establishes that the deeds in question were recorded, there is a presumption of delivery. *Resh, supra*. The evidence rules provide:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. [MRE 301.]

Whether a presumption exists is a question of law. *Isabella Co DSS v Thompson*, 210 Mich App 612; 534 NW2d 132 (1995). A presumption is dissipated once substantial evidence has been submitted by its opponent. *Id.* An unrebutted presumption can form the basis for a directed verdict or summary disposition in favor of the moving party if the person against whom the presumption is offered fails to rebut it. *Id.*

Because evidence the deeds were recorded created a presumption of delivery, plaintiffs needed to offer rebuttal evidence in order to counter the presumption. In order for plaintiffs to prevail on summary disposition, plaintiffs must have demonstrated that their rebuttal evidence was uncontravened by defendant's proofs. If plaintiffs failed to do so, defendant was entitled to summary disposition, if he could demonstrate the existence of uncontroverted evidence that he accepted the grant.

Max averred in his affidavit that he had no intent to convey to defendant a present interest when he executed and recorded the deeds quitclaiming the parcels of property to Max and defendant as joint tenants with rights of survivorship. He also averred that he did not inform defendant of the deeds. In *Lawton v Campau*, 214 Mich 535; 183 NW 203 (1921), the grantor testified that she did she did not intend to convey a present interest to the grantee when she recorded the deed. *Id*. The Supreme Court held that this testimony rebutted the presumption that she intended to deliver the deed to the grantee. *Id*. Max's testimony therefore rebutted the presumption. See also *Gibson, supra*, and *Meade v Robinson*, 234 Mich 322; 208 NW 41 (1926).

However, defendant averred in his own affidavit that he was present when Max and his attorney executed the deeds, and that Max informed him of his intent to make defendant a co-owner of the properties. Attorney J. Thomas Carroll, Jr., submitted an affidavit corroborating these statements. Accordingly, there is a genuine issue of fact regarding Max's intent with regard to recording the deeds, and plaintiffs were not entitled to summary disposition.

In order for defendant to prevail on summary disposition, he would have to establish that he accepted the conveyance, and that there is no material issue of fact with respect to this matter. In *Flood v Flood*, 295 Mich 366; 294 NW2d 714 (1940), the Supreme Court held that the grantees' reconveyance of property to a third party after the deed was recorded constituted acceptance. *Id*. In *Schmidt v Jennings*, 359 Mich 376; 102 NW2d 589 (1960), the Supreme Court held that the grantees' act of reconveying property back to the grantor to allow her tax benefit of testamentary transfer constituted acceptance, although the grantees were unaware of the deeds until they were asked to reconvey the property. *Id.* According to this case law, defendant can demonstrate acceptance by establishing that he acknowledged or acted upon the grant.

There is a question of fact regarding whether Max intended to convey a present interest in the property to defendant. If Max's averments are to be believed, then the delivery was invalid because Max intended only for a testamentary conveyance. If defendant's and Carroll's averments are to be believed, then Max intended to convey a present interest.

We reverse the trial court's judgment and remand for a trial on the issue of whether Max intended to convey a present interest in parcels A and B, and whether defendant accepted the

conveyances. We do not retain jurisdiction. Plaintiffs being the prevailing party, they may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Charles W. Johnson

[1] The Supreme Court has also held that the acceptance of a beneficial grant may ordinarily be presumed. *Schmidt v Jennings*, 359 Mich 375; 102 NW2d 589 (1960). However, in *Schmidt*, the Court based its finding of acceptance not on the presumption arising from a beneficial grant, but rather from evidence that the grantees in the case were informed of the grant and acted upon that grant. *Id.* We have not found any case in which the Court held that acceptance of a beneficial grant could be presumed when there was no evidence the grantee made some acknowledgment of the grant, or at least had some knowledge of the grant. We therefore conclude that the law of Michigan does not recognize a presumption that a beneficial grant is accepted, in the absence of any evidence that the grantee was at least aware of the grant.