

STATE OF MICHIGAN
COURT OF APPEALS

FAROUK OROW, d/b/a OROW MARKET, INC.,

Plaintiff-Appellant,

v

EKLAS OROW,

Defendant-Appellee.

UNPUBLISHED

August 22, 1997

No. 192454

Wayne Circuit Court

LC No. 95-509982 CH

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

In this action for declaratory relief, plaintiff appeals by leave from an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(7) on the ground that plaintiff's claim was barred by the statute of frauds. We reverse.

The instant action arises out of the sale of the K & G Market, a convenience store located on West McNichols in the City of Detroit. On March 26, 1991, defendant and her husband, Adel Orow, purchased the real property upon which the business was located for \$70,000 and financed the purchase by taking out a mortgage on the property. They leased the property to plaintiff, defendant's brother-in-law, who purchased the fixtures, equipment and inventory of K & G Market, now known as Orow Market, for approximately \$100,000 in cash and the assumption of the business' \$30,000 debt. In order to assist plaintiff in securing the necessary financing, defendant and her husband executed a joint guarantee of the loan obtained by plaintiff to purchase the assets.

In the course of divorce proceedings initiated by defendant against her husband in 1995, a dispute arose over the ownership of the property.¹ In order to resolve the dispute, plaintiff commenced this action seeking a declaratory ruling that defendant and Adel Orow held the property in constructive trust for his benefit pursuant to an oral contract to convey the property to him after he paid off their mortgage. Plaintiff alleged that the parties orally agreed that he would assume the mortgage instead of making payments under the terms of the lease and that the property would be considered his as long as he continued to make the mortgage payments. In fact, plaintiff presented documentation that he made over \$35,000 in mortgage payments to the property's mortgagee over the course of four years.

Plaintiff contends that the trial court erred in granting defendant's motion for summary disposition on the ground that his claim was barred by the statute of frauds. We agree. A trial court's grant of summary disposition is reviewed de novo. *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich App 487; 521 NW2d 266 (1994). A motion for summary disposition premised on the statute of frauds is brought pursuant to MCR 2.116(C)(7). In reviewing the motion, the court must consider all affidavits, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(3), (G)(5). Unless contradicted by the documentary evidence, the contents of the complaint must be accepted as true. *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Summary disposition should be granted only if no factual development of the case could provide a basis for recovery. *Marrero v McDonnell Douglas Capital Corp*, 200 Mich App 438, 441; 505 NW2d 275 (1993).

The relevant section of the statute of frauds, MCL 566.108; MSA 26.908, provides in pertinent part:

Every contract for the leasing for a longer period than 1 year, or for the 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 thereunto by him lawfully authorized in writing.

See also MCL 556.132(1)(a); MSA 26.922(1)(a), which states in pertinent part:

(1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise:

(a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

There are, however, exceptions to the statute of frauds rule. The exception applicable in this case is the doctrine of partial performance, which provides that a party's partial performance of an oral agreement involving the sale of land is sufficient to remove it from the statute of frauds. *Zander v Ogihara*, 213 Mich App 438, 445; 540 NW2d 702 (1995); *Giordano v Markovitz*, 209 Mich App 676, 679; 531 NW2d 815 (1995). Both possession of and improvements to the property as well as the payment of money pursuant to the contract are factors that may remove a contract from the operation of the statute. *Zaborski v Kutyla*, 29 Mich App 604, 607-608, 185 NW2d 586 (1971). Notably, where the contract cannot be performed within one year, partial performance will fail to negate the statute's writing or signature requirements. *Zander, supra*.

Viewing the evidence presented in this case in a light most favorable to plaintiff, we find that factual development could demonstrate that plaintiff partially performed under the contract, thus removing the oral agreement from the statute of frauds. Plaintiff alleged the existence of an oral contract under which he agreed to make monthly mortgage payments on behalf of defendant and her husband in

exchange for their transferring him title when he paid off the mortgage. Plaintiff presented documentary evidence, including canceled checks, demonstrating that he made numerous payments of greater than \$1,000 directly to the mortgage holder totaling \$35,000 over the course of four years. These payments were in excess of the \$500 rent under the terms of the written lease agreement between plaintiff, defendant and her husband. So long as plaintiff's mortgage payments were consistent with the terms of the parties' alleged oral agreement, we believe that the payment of money to a third party (rather than to defendant or her husband directly) has no impact on plaintiff's partial performance. Also, there was no evidence that defendant or her husband made any of the mortgage payments on the subject property, which would also support plaintiff's partial performance argument. Given this evidence, we believe that factual development could provide a basis for finding that plaintiff partially performed on the parties' oral agreement and should prevail in this declaratory judgment action. *Marrero*.

Also, although the term of the mortgage note was apparently eighty-four months, this does not necessarily mean that the parties' alleged oral agreement was incapable of being fully performed within one year, assuming that the parties' agreement did not forbid prepayment of the mortgage. Thus, the trial court erred in granting summary disposition because plaintiff presented sufficient evidence of partial performance to provide a basis for removing the oral agreement from the statute of frauds. *Giordano, supra; Zaborski, supra*.

In the alternative, defendant argues that plaintiff is estopped from challenging defendant's ownership status because he represented to the liquor control commission and the lottery bureau that defendant was an owner of the property. Defendant further contends that plaintiff's claim should be dismissed because the alleged agreement was illegal in that plaintiff engaged in fraudulent conduct in his dealings with the State of Michigan by misrepresenting the parties' contractual relationship to the liquor control commission and bureau of state lottery. Consideration of these issues would, however, entail analyzing the factual support for plaintiff's claims, which is improper when reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(8), such as defendant's motion. See *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991). Therefore, under the circumstances of this case, we decline to review these arguments because they were not decided by the trial court. *Bowers v Bowers*, 216 Mich App 491, 495; 549 NW2d 592 (1996).²

Reversed.

/s/ Jane E. Markey

/s/ Kathleen Jansen

/s/ Helene N. White

¹ Defendant asserts that the issues here are entangled with the divorce proceedings and what is involved is an effort to divest her of a valuable asset. We note that our reversal of the grant of summary disposition does not resolve the question of ownership. We further observe that a final decision in plaintiff's favor in the instant case would not preclude the judge presiding over the divorce case from taking into account defendant's assertions regarding the property when dividing the assets of the parties.

² However, we note that the fact that the agreement was not disclosed in plaintiff's application to the liquor control commission and lottery bureau, while perhaps improper, does not nullify, abrogate, or disprove the agreement. *Giordano, supra* at 679.