

STATE OF MICHIGAN
COURT OF APPEALS

ROBBIN HARSH,

Plaintiff-Counter defendant-
Appellant/Cross-Appellee,

v

SCOTT SYKORA and JULIANNE SYKORA,

Defendants-Counter defendants-
Appellees/Cross-Appellants,

and

JERALD L. RUSSELL and SHARON A. RUSSELL

Defendants-Counter plaintiffs-
Appellees

UNPUBLISHED

March 5, 1999

No. 206011

Isabella Circuit Court

LC No. 96-009477 CK

Before: Jansen, P.J., and Sawyer and Markman, JJ.

MARKMAN, J. (concurring in part and dissenting in part).

I respectfully disagree with my colleagues that there was a sufficient writing in this case to withstand the requirements of the Statute of Frauds. MCL 566.106; MSA 26.906. Rather, I agree with the trial court that the purported real estate transaction was void under the Statute.

The Statute of Frauds was designed to prevent disputes from arising as to the particular conditions and circumstances of land transactions. *Kelsey v McDonald*, 76 Mich 188; 42 NW103 (1889); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989). In order for a writing to comport with the Statute, it must be “certain and definite”. *In re Skotzke Estate*, 216 Mich App 247, 249; 548 NW2d 695 (1996). Generally, such a writing must include a rendition of the parties, property, consideration, and time and manner of performance in order to effectively transfer the interest in land. *Id.* Within this context, however, “rather than apply fixed rules for compliance, [the

Supreme Court] has adopted a case-by-case approach” in assessing compliance with the Statute. *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998), quoting *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367-68; 320 NW 2d 836 (1982).

In the instant case, the sole writing consists of a check written by plaintiff in the amount of \$37,883 and endorsed to defendants. A notation on the check stated “one-quarter Thayer property”. I have been unable to find any case in Michigan, whether decided under a “narrow and rigid rule for compliance”, *Opdyke, supra*, or under a more flexible rule, *Forge, supra*, in which such a “writing” has been deemed to satisfy the Statute.¹ In particular, I believe that this “writing” (a) failed to describe where the property in question was located; (b) failed to describe which specific “one-quarter” of the property in question was being transferred; (c) failed to specify when the transfer of property was to be effected; (d) failed to specify the manner or procedure by which the transfer of property was to be effected; (d) failed to indicate whether the amount of the check reflected an entire or a partial purchase price; (e) failed to describe the nature of the land interest transferred; and (f) failed even to make explicit what was only implicit, i.e. that there was a direct relationship between the transfer of the “one-quarter Thayer property” and the amount of the check.²

Perhaps what serves best to illustrate the extent to which the Statute of Frauds is not well served by the treatment of the check as a sufficient “writing” is the trial court’s own uncertainty as to whether the check evidenced an agreement to transfer an interest in property, or merely an agreement to share profits and losses connected with an interest in land. Because this confusion is wholly understandable, in my judgment, I cannot agree with my colleagues that the Statute is satisfied here. Indeed, rather than “preventing disputes over what provisions were included” in a land transaction, *Jim-Bob, supra*, the present writing does not even communicate clearly that a land transaction is its subject-matter.

While I recognize that the Supreme Court has allowed the use of parol evidence in assessing writings required by the Statute of Frauds, *Opdyke, supra* at 366-67, it seems to me implicit in the purpose of the Statute that there must be limits to such resort. At some point, an increasingly heavy reliance upon extrinsic evidence will necessarily vitiate the rule and the purpose of the Statute itself. While recognizing the difficulty of knowing exactly when this point has been reached, it has clearly been reached here, in my judgment, in view of the array of details left unresolved by plaintiff’s check. Defendants correctly assert that reversal of the trial court’s decision would “open the floodgates” of parol testimony. Therefore, I would affirm the trial court in its determination that the alleged contract in this case was unenforceable under the Statute.

However, I do agree with my colleagues that this matter needs to be remanded for further consideration of plaintiff’s fraud claim. I do not believe that the Statute operates to bar an independent tort claim, as long as the required elements of fraud based upon false representation are established. There is no requirement of an enforceable contract in order to prove a fraud, although the existence or non-existence of such a contract may well be relevant to the claim. Because it is not clear to me the weight which the court placed upon its Statute of Frauds determination in assessing the merits of the fraud claim, and because there was no consideration

of the evidence in the fraud claim, nor any articulation by the trial court of facts in support of its conclusion, I would remand for further consideration.³

/s/ Stephen J. Markman

¹ Plaintiff's counsel suggested at oral argument that the writing sustained against a Statute of Frauds challenge in *Barton v Molin*, 219 Mich 347; 189 NW 74 (1922) was the closest analogue to the instant writing. I respectfully disagree with this characterization and find that the two writings considered jointly in that case were far more specific than the instant writing. See also *Begg v Bowerman*, 366 Mich 346; 115 NW2d 63 (1962), in which a check containing an even more precise description of a land transaction than in the instant case was found not to satisfy the Statute.

² While I would not agree with the proposition that a negotiable instrument can never constitute, in whole or in part, the requisite "writing" for Statute of Fraud purposes, I nevertheless agree with the trial court that such instruments must be scrutinized with special care. In particular, the court noted that defendant's signature here appeared only on the back of the check, not on the front where the other alleged terms of the agreement were found. While perhaps not an especially significant consideration in the context of a fuller writing, I believe this to be a relevant consideration in determining whether a far scantier writing, such as in the instant case, satisfies the requirements of the Statute.

³ I would also remand on the counterclaim for a fuller articulation by the trial court as to its basis for choosing not to award attorney's fees and costs "in the interest of justice" under MCR 2.405(D)(3) on the Statute of Frauds claim. See *Luidens v 63rd District Court*, 219 Mich App 24, 31; 555 NW2d2d 709 (1996). I find no error in its denial of defendants' motion for attorney's fees pursuant to MCL 600.2591; MSA 27A.2591. Although unprevailing, in my judgment, plaintiff's claim was not frivolous or devoid of arguable legal merit.