

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

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NIALL M. CULLINANE,

Plaintiff/Counter-Defendant-  
Appellee,

v

ESTATE of HOLLY VENE, by CHRISTIAN  
VENE, Personal Representative,

Defendant/Counter/Third-Party-  
Plaintiff-Appellant,

and

WOODLAND SCHMIDT REALITY, and DAVID  
GREGERSEN,

Third-Party Defendants.

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UNPUBLISHED  
June 21, 2012

No. 305030  
Allegan Circuit Court  
LC No. 09-045877-CH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Plaintiff brought this action against the Estate of Holly Vene for specific performance of a contract for the sale of real property entered into August 29, 2009. Holly Vene committed suicide while the sale was pending closing. The estate defended the action and sought rescission on the grounds that the decedent's depression rendered her legally incapable to contract and that, for various other reasons, the contract was unenforceable. Following a bench trial, the trial court in an opinion and order dated May 27, 2011; ruled in plaintiff's favor and granted specific performance. The trial court denied reconsideration on June 23, 2011. We affirm.

**I. FACTUAL BACKGROUND**

Testimony at the trial and through depositions showed that Holly<sup>1</sup> suffered a number of setbacks in 2008 and 2009, culminating in her being hospitalized for acute depression during the

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<sup>1</sup> To avoid confusion, the Venes will be referred to by their first names in this opinion.

first week of June 2009. These events included the business and personal bankruptcy of her husband, Christian, and the failure of Holly's start-up pharmaceutical company. On September 18, 2008, American Charter Bank (ACB), obtained an Illinois judgment for \$3,808,476.85 against Christian's construction businesses, and individually against both Christian and Holly. Christian and Holly owned homes in Highland Park, Illinois, and on Lake Michigan in Fennville, Michigan. At some point, Christian had quitclaimed his interest in the homes to Holly. ACB filed judgment liens against both properties, which were already mortgaged.

From February 2009 through sometime after her June hospitalization, Holly worked with Chicago area realtors Jeannine Viti and Kinga Korpacz, a specialist in arranging short sales, to sell the Highland Park home before it went into foreclosure. Holly also negotiated with ACB to limit her personal liability on the multi-million dollar judgment it had obtained. On May 7, 2009, Holly and an ACB representative signed a settlement and mutual release agreement in which the bank agreed to limit Holly's personal liability on the judgment to \$250,000, with possible further reductions of \$50,000 if paid within three years, \$25,000 if paid with five years, or \$10,000 if paid within seven years of the effective date of the agreement.

Christian, Viti, Korpacz, and Holly's long-time friend, Bella Boury, all testified to Holly's declining physical and mental state from the end of 2008 through the middle of August 2009. These witnesses observed that Holly lost weight, was constantly crying, agitated, indifferent to her appearance, expressed anger at Christian and ACB, worried about her financial situation and that of her 23-year-old son facing criminal charges, expressed suicidal thoughts, and had difficulty staying focused on tasks. There was also testimony that Holly had Parkinson's disease that caused hand tremors and which her depression exacerbated. Holly's condition became worse at the end of May after her son McKenzie was jailed on drug charges. Viti, Korpacz, and Christian met with Holly to complete gathering documents necessary to seek approval of the bank for a short sale of the Highland Park home. Holly completed a hand-written hardship statement, but with great difficulty. Shortly after this meeting, on June 1, 2009, Christian took Holly to the emergency room of a Chicago area hospital.

At the hospital, Holly was evaluated by a physician and by Douglas DeRhodes, a crisis worker holding a masters degree in social work. DeRhodes was deposed and testified that when he saw Holly, she was suffering "acute depression exacerbated by multiple environmental stressors." He opined that Holly had a "major depressive disorder, recurrent, severe, without psychotic behavior or psychotic features" that was impacting all facets of her life and that she needed inpatient treatment. Although Holly signed a voluntary admission form, DeRhodes signed a petition for involuntary commitment to facilitate transporting Holly to Elgin Mental Health Center. DeRhodes did not see Holly after his initial intake assessment on June 1, 2009.

Christian testified that Holly was discharged from Elgin in the first week of June 2009. Thereafter, Holly continued to see a doctor and take her medication. Christian left for France on August 3, 2009, and did not return to this country until after Holly's death.

After being discharged from Elgin, Holly continued to work with Viti and Korpacz on attempting a short sale of the Highland Park home. Neither Viti nor Korpacz expressed concern regarding Holly's mental capacity to sign documents to facilitate the sale process. An offer on the Highland Park home was submitted after Holly's discharge from Elgin. The lien holders

approved a short sale but would not waive their right to collect any deficiency. Consequently, in mid-August, Holly decided not to pursue the short sale and the home went into foreclosure. Viti and Korpacz did not see Holly after the effort to sell the Highland Park Home ended.

Boury testified that she remained in contact with Holly during July and August 2009. Boury helped Holly sell some of her artwork and furniture. She took Holly to what Boury referred to as a “resale store” and also referred Holly to mutual friends in the market for antique furniture. Boury last saw Holly in August 2009 at the Fennville home where Holly allowed Boury and her family to stay a few days. Holly had driven from Chicago to Fennville to meet with real estate brokers regarding selling the home there.

On August 14, 2009, Holly signed a uniform listing agreement with Coldwell Banker Woodland Schmidt, represented by real estate agent David Gregersen, to sell the Fennville home. Gregersen met with Holly twice regarding a market analysis of the home; he recommended a listing price of \$1,550,000 that he expected would be reduced to a selling price of \$1,400,000. Holly, however, hoped to facilitate a quick sale and listed the home for sale at \$1,400,000, “subject to lien holder’s approval.” Gregersen testified that although Holly was depressed about her financial situation and selling the home he was not concerned about her ability to understand the nature and consequences of the documents she was signing. Holly even negotiated the realtor’s commission rate from 7% to 5%.

On August 24, 2009, plaintiff through his real estate agent, Tammy Kerr, submitted an offer to purchase the Fennville home for \$1,100,000. Holly made a counteroffer on August 25, 2009, for \$1,340,000, which Gregersen facilitated through email or facsimile transmittals. After further negotiations, plaintiff and Holly reached agreement on a sales price of \$1,200,000 for the home, subject to lien holders’ approval, and \$50,000 for personal property in the home. Plaintiff and Holly signed two addenda to the original offer on August 29, 2009. Paragraph 20 of the agreement provides: “If agreeable to both parties, the sale will be closed as soon as closing documents are ready, but not later than September 30, 2009.” The sale was moving toward closing when Holly committed suicide on September 5, 2009.

In its May 27, 2011, opinion and order, the trial court ruled in pertinent part as follows:

In the instant case, the essential terms of the contract for the sale of land were met and a binding legal contract was formed. The property, parties, and consideration are all sufficiently identified. The testimony and evidence support that there was an agreement between the parties and that the agreement had been fulfilled but for the subject to lien holder’s approval condition. However, not only is this not an essential element, it is also one that is typically not settled until the time of the closing. The testimony is uncontroverted that the lien holder would have been satisfied by the conditions of the sale. The buyer, Mr. Cullinane, had done everything requested of him in the contract, and any delay in the date of closing is completely attributable to the seller.

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Based on the evidence presented, the Court determines Ms. Vene was not incapacitated at the time of the agreement. The testimony provided the court with a picture of a woman who had significant life problems, but was mentally acute and able to negotiate several changes in the contract, reduce her obligation to the bank, and manage to do numerous daily life activities without aid from family or friends. There is no doubt that Ms. Vene was depressed and sad, but the testimony did not rise to the level of legal incapacity. Ms. Vene committed suicide on September 5, 2009. It is not possible for the Court to determine what Ms. Vene's mental state was on that date. Regardless, her decision to commit suicide is not determinative of her mental ability to engage in a contract in the time preceding her death.

This Court finds there was a binding legal contract between Holly Vene and Plaintiff for the sale of property. The contract contained all essential terms and Plaintiff is entitled to specific performance. Further, the Court finds Holly Vene was not legally incapacitated and the contract is not voidable. Thus, Plaintiff is entitled to specific performance. The title to 2556 Lakeshore Drive in Fennville, Michigan shall be transferred to the Plaintiff upon his tender of the agreed upon purchase price.

Defendant moved for reconsideration, which the court denied in an opinion and order dated June 22, 2011, writing in part:

The Court has carefully reviewed all the evidence and the opinion and order in considering Defendant's Motion for Reconsideration. In the Motion, Defendant largely argues the amount of weight the Court put on various pieces of evidence. Importantly, the Court did consider all the evidence, even evidence (such as the range in appraisals of the home) that were not included in the opinion. Although Defendant may not agree with how the Court weighed the evidence, Defendant has failed to show that the way the Court weighed the evidence was a palpable error that misled the court and the parties and that a different disposition must result.

Defendant also argues that the Court made an error of fact in stating that only Tammy Kerr and David Gregersen saw Mrs. Vene from August 15, 2009 to the time of her suicide. Defendant is correct that Tammy Kerr did not personally see Ms. Vene during this time period. However, it is accurate that the only witness who provided testimony who had contact (whether it was personal or through email) with Mrs. Vene was, in fact, Mr. Gregersen. This change in the presented facts does not change the Court's opinion in the outcome.

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In general, although Defendant has shown disagreement with how the Court has weighed and assessed the evidence, Defendant has not shown palpable error as required by MCR 2.119(F)(3). For the above reasons, Defendant's Motion for Reconsideration is DENIED.

Defendant now appeals by right.

## II. STANDARD OF REVIEW

Plaintiff's complaint for specific performance is an equitable action. *Samuel D Begola Services, Inc v Wild Brothers*, 210 Mich App 636, 639; 534 NW2d 217 (1995). We review the trial court's factual findings for clear error, and its legal conclusions de novo. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130; 743 NW2d 585 (2007). A trial court's finding is clearly erroneous only when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993). The granting of specific performance on a contract for the purchase of real estate rests within the sound discretion of the trial court, but the court may not arbitrarily refuse to specifically enforce the contract. *Zurcher v Herveat*, 238 Mich App 267, 300; 605 NW2d 329 (1999).

## III. ANALYSIS

Defendant first argues that the trial court clearly erred in finding that Holly possessed the mental capacity to enter a binding contract for the sale of the real property at issue. We disagree.

"A firmly embedded principle in our jurisprudence is that legal documents must be executed by one possessing the mental competence to reasonably understand the nature and effect of his action." *Persinger v Holst*, 248 Mich App 499, 503; 639 NW2d 594 (2001). But courts will generally presume the legality, validity, and enforceability of contracts. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507; 741 NW2d 539 (2007). Moreover, defendant bore the burden of proving Holly lacked the legal capacity to contract. *Klein v Kent*, 356 Mich 122, 127-128; 95 NW2d 864 (1959); see also *Estate of Mullin v Duenas*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 303192, April 17, 2012), slip op at 2-3 (holding the plaintiff failed to show that the decedent was incompetent to enter a marriage contract). Regardless of who bore the burden of proof, the trial court did not clearly err in finding that Holly possessed the mental capacity to contract.

A person has the mental capacity to enter a contract when the person has sufficient mental ability "to understand in a reasonable manner the nature and effect of the act in which the person is engaged." *In re Erickson Estate*, 202 Mich App at 332. Further, to void a contract on the basis of a party's mental capacity, it must be shown not only that the contracting party "was of unsound mind or insane" when the contract was made, "but that the unsoundness or insanity was of such a character that the person had no reasonable perception of the nature or terms of the contract. *Id.* Emotional disorders of a person alone will not establish lack of mental capacity to contract. *Star Realty, Inc v Bower*, 17 Mich App 248, 258; 169 NW2d 194 (1969). In sum, to render a contract void, the mental incompetence of a contracting party must exist at the time the contract is entered and must relate to the subject of the contract. *Anderson v Boullis*, 15 Mich App 515, 520; 166 NW2d 631 (1969), citing *Applebaum v Wechsler*, 350 Mich 636, 648-649; 87 NW2d 322 (1957); see also *Wroblewski v Wroblewski*, 329 Mich 61; 44 NW2d 869 (1950).

In the present case, the trial court found that David Gregersen's testimony was credible. Gregersen was the only witness who testified who had direct and indirect contact with Holly during the critical timeframe at issue, the formation of the contract for the sale of the Fennville

property. From his testimony and the documentary evidence, the trial court determined that Holly entered into the contract knowingly and voluntarily and that she understood the nature and consequences of the sale of the house, i.e., that Holly possessed the mental capacity to enter the contract. *In re Erickson Estate*, 202 Mich App at 332. We must generally defer to the trial court's superior ability to determine the credibility of witnesses appearing before it. *Id.* at 331; *Anderson*, 15 Mich App at 521; MCR 2.613(C). Furthermore, it is the province of the trial court, not an appellate court, to assign the weight to be accorded conflicting evidence. See *Morgan v Botsford*, 82 Mich 153, 155; 46 NW 230 (1890) (action at law); *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). Because there was credible evidence that supported the trial court's findings, we cannot say that the court's finding that Holly was mentally competent to enter into the contract was clearly erroneous. *In re Erickson Estate*, 202 Mich App at 333-334; *Star Realty*, 17 Mich App at 258-259; *Anderson*, 15 Mich App at 521-522.

Defendant presents several arguments why the trial court clearly erred. One error in the trial court's initial opinion was finding that Tammy Kerr observed Holly's condition during the period when the contract was negotiated. The trial court, however, acknowledged this error in ruling on defendant's motion for reconsideration but determined it did not affect the court's findings of fact or the ultimate outcome. Most of the remaining arguments defendant asserts pertain to credibility of witnesses and the weight to be assigned the evidence. Specifically, defendant argues that Gregersen had a financial incentive to be untruthful, and the court erred by allowing his testimony to trump that of Christian, Viti, Korpacz, Boury, and DeRhodes. But this argument, as the trial court correctly observed, relates to the credibility of witnesses and the weight to be assigned the evidence and provides an insufficient basis for finding that the trial court clearly erred. Moreover, none of the witnesses on which defendant relies testified regarding Holly's mental condition at the time the contract was formed.

Defendant cites *Beattie v Bower*, 290 Mich 517, 525; 287 NW 900 (1939), for the proposition that "[l]ack of capacity to execute a deed [or enter a contract] at a particular time may be proved by the grantor's [or contractor's] condition before and after that time, and that a prior or subsequent condition may be presumed to exist at the time the deed was made." But *Beattie* makes clear that the pertinent time is when the deed is executed, or here, when the contract was formed. Evidence of a contractor's incompetence before and after a contract is entered will be insufficient to establish incompetence at the time the contract is entered where there is credible evidence to the contrary at the time the contract is entered. See *Wroblewski*, 329 Mich at 64-66; *Burmeister v Russell*, 362 Mich 287, 289-290; 106 NW2d 752 (1961). Additionally, before and after her one-week hospitalization in June 2009, both Viti and Korpacz found Holly sufficiently competent to sell the Highland Park home and personal property. Also, Holly's depression did not convince Christian to petition a court to appoint a conservator or guardian, or dissuade him from extended stays in France. In short, based on our review of the entire record, we are not left with a definite and firm conviction that a mistake has been made. *Estate of Mullin*, \_\_\_ Mich App at \_\_\_; *In re Erickson Estate*, 202 Mich App at 331.

Defendant's additional arguments on appeal also lack merit. First, defendant argues that the trial court clearly erred in finding that the provision of the contract that the sale was "subject to lien holder approval" would have been satisfied had closing occurred as scheduled. The trial court found that "not only is this not an essential element," but that "[t]he testimony is uncontroverted that the lien holder would have been satisfied by the conditions of the sale." We

agree that the uncontroverted evidence established that the lien holders' approval would have been forthcoming at closing. Consequently, we conclude that the trial court did not clearly err in regard to this finding. *In re Erickson Estate*, 202 Mich App at 331.

A preliminary United States Housing and Urban Development settlement statement, (HUD-1), prepared by Chicago Title in anticipation of closing and admitted at trial as Exhibit 5, disclosed two liens on the subject property. Defendant presents no argument that the lien of Bank of America, presumably the first mortgagee, in the amount of \$674,000, would not have been satisfied at closing. Rather, defendant argues that plaintiff did not prove that the second lien held by ACB in the amount of \$3,808,476.85 would have been satisfied. Defendant contends that the May 2009 settlement agreement between Holly and ACB (Exhibit 7), which limited Holly's personal liability on ACB's judgment to no more than \$250,000, cannot serve as "lien holder approval" of the sale because it occurred before Holly entered the contract to sell the Fennville property. Further, defendant argues that ACB's amended memorandum of judgment lien in the amount of \$250,000 (Exhibit 4), which ACB filed in May 2009 with respect to the Fennville property, did not remove the cloud on the title stemming from ACB's original \$3,808,476.85 lien. Finally, defendant argues that ACB's settlement with Holly did not release Christian or his businesses from the \$3.8 million lien; therefore, it was not established that ACB would have accepted \$250,000 in satisfaction of its judgment lien from the sale of the Fennville property.

We answer defendant's last argument by noting that the Fennville property was solely in Holly's name. Defendant points to no evidence that ACB sought to set aside any conveyance of the Fennville property between Christian and Holly as a fraudulent transfer. The only asset in Holly's Michigan estate was the Fennville property (Exhibit 24). Consistent with its settlement agreement with Holly and the amended notice of judgment lien, ACB filed a claim with Holly's estate for \$250,000 (Exhibit 15). Thus, while defendant is technically correct that the settlement agreement between Holly and ACB preceded Holly's contract for the sale of the Fennville property, and also correct that the \$3.8 million lien had not been withdrawn, we nevertheless conclude that the evidence supports the trial court's finding. Specifically, the documentary evidence, coupled with the testimony of Fred Perlini of Chicago Title, establishes that lien holder's approval of the sale would have been obtained at closing.

Last, defendant argues, based on the expiration of Holly's counteroffer without an acceptance, that no contract was formed. Defendant contends that Holly's original counteroffer expired by its plain terms on August 27, 2009, without plaintiff's having accepted it. Thereafter, the final terms of the agreement between plaintiff and Holly were set forth in two addenda, drafted on August 28 and August 29, 2009. Defendant asserts that because addenda are amendments to an existing agreement and because there was never an acceptance of Holly's counteroffer, no contract ever existed between plaintiff and Holly. We disagree.

Defendant fails to support its legal syllogism with authority. As a result, we may deem this argument abandoned. *Spires v Bergman*, 276 Mich App 432, 444; 741 NW2d 523 (2007). Nevertheless, we conclude that the trial court correctly ruled that plaintiff's original offer, together with the two addenda to plaintiff's original offer, which both plaintiff and Holly signed, manifested their mutual assent to all the essential terms of a contract for the sale of real property. See *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005); *Zurcher*, 238 Mich

App at 282-283, 290-291. The signed addenda represented Holly's acceptance of the plaintiff's offer, as modified, and plaintiff's acceptance of the modifications. There was a meeting of the minds on all essential terms of the contract, *Burkhardt v Bailey*, 260 Mich App 636, 655; 680 NW2d 453 (2004), and plaintiff's original offer and its addenda satisfied the written formality necessary to a valid contract, *Zurcher*, 238 Mich App at 276-277. Consequently, a binding contract for the sale of real property arose between plaintiff and Holly. The trial court did not abuse its discretion by ordering specific performance. *Id.* at 300; *In re Egbert R Smith Trust*, 480 Mich 19, 26-27; 745 NW2d 754 (2008).

We affirm. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio  
/s/ Jane E. Markey  
/s/ Donald S. Owens