

STATE OF MICHIGAN
COURT OF APPEALS

BRENDA G. BELL,

Plaintiff-Appellant,

v

JUDITH A. BEANUM and EARL R. BEANUM,

Defendants-Appellees.

UNPUBLISHED

March 16, 2004

No. 241833

Wayne Circuit Court

LC No. 02-208611-CZ

Before: Fitzgerald, P.J., and Neff and White, JJ.

FITZGERALD, P.J. (*dissenting*).

I disagree with the majority's decision to reverse the order granting summary disposition on the basis of subrogation. Although plaintiff made a general allegation in her "Complaint to Determine Interest in Land" that she became the subrogee of the mortgagee's interest, plaintiff indicated below in her brief in response to defendants' motion for summary disposition that "this is an action to foreclose on an equitable mortgage." Plaintiff never argued that she was entitled to subrogation, and the proceedings below focused on the issue of an equitable mortgage. On appeal, plaintiff no longer argues that she has an equitable mortgage, but rather claims that she is subrogated to the rights of the mortgagee whose interest she paid. When a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below. *Gross v General Motors Corp*, 448 Mich 147, 161-162 n 8; 528 NW2d 707 (1995). Thus, I would conclude that plaintiff's argument on appeal is not properly before this court.

With regard to the issue addressed by the trial court, I would conclude that the circuit court properly granted summary disposition to defendants on plaintiff's claim of an equitable mortgage because the claim is unenforceable under the statute of frauds. MCL 566.106 provides:

No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

Further, MCL 566.108 provides:

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 . . .

In the present case, there is no dispute that there is no written document granting plaintiff an interest in the real property.¹ Instead, her claim of interest is premised on an alleged verbal agreement that she memorialized in a document² that she unilaterally signed and recorded. In essence, plaintiff attempted to grant herself a mortgage against defendants' property without obtaining anything in writing from defendants. All claims for an interest in real property must be in writing and signed by the person granting the interest. MCL 566.106; MCL 566.108.

Although there is federal authority for the proposition that an oral agreement to grant a mortgage to a creditor does not run afoul of the statute of frauds, *Schram v Burt*, 111 F2d 557, 561-562 (CA 6, 1940), this Court has held that the statute of frauds bars relief when the plaintiff claims an oral mortgage agreement. *Schultz v Schultz*, 117 Mich App 454, 460; 324 NW2d 48 (1982). This Court is not bound by a federal court decision construing Michigan law, *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 402; 571 NW2d 530 (1997), whereas “[a] decision by any panel of this Court is controlling precedent until a contrary result is reached by this Court or the Supreme Court takes other action.” *Holland Home v Grand Rapids*, 219 Mich App 384, 394; 557 NW2d 118 (1996). Therefore, I would conclude that summary disposition in favor of defendants was properly granted.

/s/ E. Thomas Fitzgerald

¹ The complaint does not allege that defendants agreed to give plaintiff a mortgage or property interest in the real property.

² “Notice of Claim of Financial Interest.”