

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

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In re Estate of ROBERT R. WILLIAMS.

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J. BRUCE WILLIAMS,

Petitioner-Appellant,

v

Estate of ROBERT R. WILLIAMS, SALLY  
WILLIAMS, Personal Representative of the Estate  
of ROBERT R. WILLIAMS, and SALLY  
WILLIAMS, Individually,

Respondents-Appellees.

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UNPUBLISHED  
December 6, 2005

No. 262203  
Kalamazoo Probate Court  
LC No. 2004-000305-CZ

Before: Bandstra, P.J., and Neff and Markey, JJ.

PER CURIAM.

Petitioner appeals as of right from the trial court order granting summary disposition in favor of respondents under MCR 2.116(C)(10). We affirm.

Petitioner brought this action against respondents, seeking specific performance of a right of first refusal agreement to purchase the decedent's property. Respondents maintained that petitioner failed to obtain an appraisal of the property, as required by the right of first refusal agreement. Petitioner contended that he satisfied this requirement by designating an appraiser, although the appraiser subsequently failed to prepare a formal appraisal and refused to return petitioner's phone calls. Throughout the proceedings, petitioner maintained that the decedent had conveyed a life estate in the property to respondent Sally Williams, which affected the value of the property. He also insisted that the purchase price of the property must reflect the value of the property without a log house that Williams had built on the property with her own funds. Williams repeatedly denied holding a life estate in the property. She also filed her own claim for unjust enrichment against the decedent's estate, seeking compensation for the value of the log house.

Despite petitioner's failure to obtain a proper appraisal for the property in accordance with the right of first refusal agreement, the trial court gave petitioner two additional opportunities to exercise his right of first refusal by submitting an appropriate offer or appraisal. Although petitioner submitted a conditional offer, he never obtained an appraisal. The trial court

subsequently granted summary disposition in favor of respondents on petitioner's complaint for specific performance of the right of first refusal agreement.<sup>1</sup> The trial court declined to consider a separate summary disposition motion filed by petitioner because it was not timely filed.

Petitioner argues that summary disposition was improper because there was a question of fact regarding his designation of an appraiser. We review de novo a trial court's decision on a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

Here, summary disposition for respondents was proper because there was no genuine issue of material fact regarding whether petitioner satisfied his obligation under the right of first refusal agreement to designate an appraiser in accordance with the agreement's provision for determining the value and price of the property. Additionally, the trial court properly found no support for petitioner's claim that respondent Williams held a life estate in the property, thus preventing him from obtaining an accurate appraisal of the property.

The submitted evidence demonstrated that petitioner had ample opportunity to obtain an appraisal: first, when Williams notified him of the estate's intent to convey the property to the decedent's heirs in March 2003, then when the parties stipulated to the pretrial order in June 2004, and finally when the trial court extended the pretrial order at the hearing on the first motion to dismiss in September 2004. The only evidence that petitioner obtained an appraiser was his deposition testimony that he contacted William Hurley in September 2003. But Hurley only verbally informed petitioner of the approximate value of the property, never actually appraised the property for petitioner, and did not return petitioner's subsequent telephone calls. Hurley averred in an affidavit that petitioner never "formally hired" him. Petitioner was afforded an additional year to initiate the process with a different appraiser after Hurley failed to fulfill his alleged agreement to appraise the property for petitioner in September 2003, but made no good-faith effort to do so. Petitioner failed to establish a genuine issue of material fact with regard to whether he satisfied his obligation to obtain an appraiser in accordance with the right of first refusal agreement.

The evidence also failed to establish that the decedent conveyed a life estate to respondent Williams. MCL 566.108 provides, in pertinent part:

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<sup>1</sup> Although the trial court did not cite the applicable court rule pursuant to which dismissal was ordered, it effectively treated respondents' motion to dismiss as a motion for summary disposition under MCR 2.116(C)(10).

Every contract for the leasing for a longer period than one [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 *Eerdmans v Maki*, 226 Mich App 360, 364-365; 573 NW2d 329 (1997) (holding that a contract for the sale of land must satisfy the statute of frauds, meaning that there must be a writing signed by the seller or his agent). A life estate is an interest in land and, therefore, was required to be established by a written conveyance. There was no evidence of any written conveyance establishing a life estate in this case.

Additionally, petitioner failed to establish that there was even an oral contract for the decedent to convey a life estate to Williams. In *Eerdmans*, *supra* at 364, this Court held:

A valid contract requires mutual assent on all essential terms. Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. Before a contract can be completed, there must be an offer and acceptance. An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. Acceptance must be unambiguous and in strict conformance with the offer. [Citations and internal quotation marks omitted.]

Here, there was no evidence that the decedent and Williams agreed to create a life estate in Williams in order to protect her interest in the log house. Williams testified that a counselor they saw suggested the creation of a life estate as a possible solution to their problem, but the evidence did not show that they followed through with this suggestion. The “relationship contract” states only that the decedent would consult an attorney to obtain information about a life estate, and discuss it with Williams. There was no evidence of an actual clear offer by the decedent, nor a clear acceptance by Williams, of any life estate.

Petitioner argues that the statute of frauds does not bar conveyance of a life estate to Williams, because there was partial performance of the conveyance, and because parties may voluntarily perform oral contracts even if the law will not enforce them. Partial performance, such as possession, improvements, and payment of money, may remove a real estate contract from the statute of frauds. *Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971). For partial performance to be established, however, there must be acts which unequivocally refer to, and result from, the agreement. *Groening v McCambridge*, 282 Mich 135, 140; 275 NW 795 (1937). Williams built the log house before there was any discussion of a life estate, so her performance could not have unequivocally referred to, or resulted from, any alleged agreement to create a life estate. Petitioner also argues that the statute of frauds does not preclude parties from voluntarily performing an oral contract to convey real estate if they choose to do so. Here, however, neither the estate nor Williams has demonstrated any intent or desire to do so. Indeed, Williams repeatedly denied possessing a life estate.

In sum, petitioner failed to provide any evidence that the decedent conveyed a life estate to Williams, or entered into a binding agreement to do so. Williams’ deposition testimony referring to discussion of a life estate before the decedent died does not establish a question of

fact on this issue. Accordingly, the trial court properly granted summary disposition in favor of the estate, because petitioner's reliance on the existence of a life estate as an impediment to obtaining an appraisal in order to exercise his right of first refusal was unfounded.

Petitioner also argues that the trial court misapplied the summary disposition standard by ruling that there was no life estate, although respondents failed to raise this as an issue. The party moving for summary disposition under MCR 2.116(C)(10) has the initial burden of supporting its position with documentary evidence. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). However, when the burden of proof at trial on an issue of material fact rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue exists. *Id.* If the nonmoving party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.*

Here, petitioner raised the issue of Williams' life estate to justify his failure to complete the appraisal process. Consequently, the burden of proof was upon petitioner to show that Williams held a life estate. Because petitioner failed to come forward with competent evidence of a life estate, the trial court properly granted summary disposition in favor of respondents.

Petitioner claims that the trial court improperly refused to review and consider deposition transcripts that he submitted. We disagree. The trial court stated that it reviewed all of the submitted evidence except the evidence submitted in petitioner's untimely summary disposition motion. We note that petitioner filed the depositions separately from his summary disposition motion. Consequently, the record does not support petitioner's claim.

Petitioner also claims that if the trial court had reviewed the depositions, it could not have found that he failed to designate an appraiser. We disagree. As previously discussed in our analysis, petitioner's deposition testimony failed to establish that he designated an appraiser in accordance with the right of first refusal agreement, despite being given several opportunities to do so. Petitioner also relies on the fact that Hurley was hired by the estate to appraise the property for purposes of the federal estate tax return to argue that he satisfied his obligations under the right of first refusal agreement. We disagree. Hurley was required to evaluate the value of the property at the time of the decedent's death for federal estate tax purposes. That appraisal did not reflect the value of the property at the time petitioner elected to exercise his right of first refusal. Further, the right of first refusal agreement required each party's appraiser to select a third appraiser. Petitioner failed to show that he made any effort to initiate this portion of the process with Hurley or any other appraiser.

Petitioner also argues that the trial court erred in finding that Williams had a claim for unjust enrichment. Williams filed a claim for unjust enrichment against the decedent's estate. That claim did not affect petitioner's right of first refusal. The trial court correctly determined that Williams had no life estate in the property, and whether she had a valid unjust enrichment claim against the estate has no bearing on petitioner's action to enforce his right of first refusal.

Finally, petitioner argues that the trial court was biased against him, and prejudged issues without considering his evidence. Petitioner failed to preserve this issue by raising it in the trial court. MCR 2.003(C); *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 56 n 2; 539 NW2d 382 (1995); *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401

(1997). Accordingly, our review is limited to plain error affecting defendant's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

A party challenging a judge for bias must overcome a heavy presumption of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). A judge may be disqualified under MCR 2.003(B)(1) if the judge expresses actual bias or prejudice against a party or an attorney. *Id.* at 495. Where a judge forms an opinion during the course of a proceeding on the basis of facts introduced or events that occur during the proceeding, the opinion does not constitute a basis for disqualification on the grounds of bias or partiality unless a deep-seated favoritism or antagonism is displayed that would make fair judgment impossible. *Id.* at 496.

We find no evidence of judicial bias in this case. The trial court's rulings were legally correct and consistent with the evidence. The trial court's comments about petitioner were not derogatory. They reflected the trial court's accurate observations that petitioner did not diligently exercise his right of first refusal because he did not want to pay the value of the property with the house. The trial court's remarks were justified where petitioner doggedly pursued tenuous legal theories instead of diligently obtaining an appraisal and presenting a good-faith purchase offer. They do not reflect deep-seated antagonism against petitioner.

We affirm.

/s/ Richard A. Bandstra

/s/ Janet T. Neff

/s/ Jane E. Markey