

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

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NORMAN MALBURG and LORRAINE  
MALBURG,

Plaintiffs-Appellants,

v

WAYNE J. LENNARD & SONS, INC., KIM J.  
LENNARD and PAUL NEUMANN,

Defendants/Cross Defendants-  
Appellees,

and

JO ANN GERWECK and GERWECK REAL  
ESTATE COMPANY,

Defendants/Cross Plaintiffs-  
Appellees,

and

ANNETTE E. NEUMANN,

Defendant-Appellee.

UNPUBLISHED  
August 28, 2003

No. 236980  
Monroe Circuit Court  
LC No. 97-006678-CK

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NORMAN MALBURG and LORRAINE  
MALBURG,

Plaintiffs-Appellants,

v

PAUL M. NEUMANN and ANNETTE E.  
NEUMANN,

Defendants-Appellees.

No. 236981  
Monroe Circuit Court  
LC No. 99-009517-CH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

In Docket Nos. 236980 and 236981, plaintiffs brought suit seeking specific performance of a real estate sale transaction involving 952 acres of farmland in Monroe County. In Docket No. 236980, plaintiffs alleged that they had an existing sale agreement for the purchase of the property with the sellers, defendants Wayne J. Lennard & Sons, Inc. and Kim Lennard (“the Lennards”), that was breached when the Lennards sold the property to Paul Neumann. Plaintiffs also alleged a claim of promissory estoppel against the Lennards.<sup>1</sup> In Docket No. 236981, plaintiffs alleged claims of tortious interference with contract and civil conspiracy against Paul Neumann and Annette Neumann (“the Neumanns”). The cases against the Lennards and the Neumanns were consolidated in the lower court. After all parties moved for summary disposition, the trial court granted summary disposition in favor of the Lennards and the Neumanns. Plaintiffs appeal as of right. We affirm.

### I. Standard of Review

On appeal, a trial court’s grant or denial of summary disposition is reviewed de novo. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Under MCR 2.116(C)(10), summary disposition of all or part of a claim may be granted when, “except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

### II. Analysis

#### A. The Existence of a Contract for Sale.

It is undisputed that, following plaintiffs’ offer dated July 17, 1996, a series of letters and other correspondences were exchanged between plaintiffs and the Lennards through Jo Ann Gerweck, who acted as an agent for both parties. The first question presented on appeal is whether the above correspondences created a contract for the sale of the property, as plaintiffs contend, or whether the documents merely demonstrate an exchange of offers and counteroffers, as defendants assert. We conclude that no contract for the sale of property existed in this case.

There is a “distinction between the *form* of a contract for the sale of land and the substance of that contract.” *Zurcher v Herveat*, 238 Mich App 267, 276; 605 NW2d 329 (1999) (emphasis in original). The statute of frauds, which dictates the form of such contract, *id.*, provides that the sale of land or any interest in land must be “in writing, and signed by the party

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<sup>1</sup> In Docket No. 236980, plaintiffs also filed suit against Jo Ann Gerweck and Gerweck Real Estate Company which were subsequently dismissed.

by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing.” MCL 566.108. The substance of a contract for the sale of land is governed by the general contract law principle that “there must be a meeting of the minds regarding the ‘essential particulars’ of the transaction.” *Zurcher, supra* at 279. The material provisions are “the identification of (1) the property, (2) the parties, and (3) the consideration.” *Id.* at 290-291. Mutual assent is also referred to as “meeting of the minds.” *Kamalath v Mercy Mem Hosp Corp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992). To establish the meeting of the minds element of a contract, “[t]here must be no variance between the acceptance and the offer. Accordingly a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested.” *Harper Bldg Co v Kaplan*, 332 Mich 651, 656; 52 NW2d 536 (1952) (citation omitted). See, also, *Kamalath, supra* at 549 (“A counter proposition is not an acceptance”). “For a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered.” *Zurcher, supra* at 296.

The relevant documents in this case include only two documents that were signed by Kim Lennard, the seller. The first document, dated September 30, 1996, is a memorandum that conditioned the Lennard’s acceptance of plaintiffs’ offer to purchase the property on six different items. The first requirement was that the purchase price should be \$2,550,000, with a down payment of \$775,000. Plaintiffs’ attorney had offered a down payment of either \$750,000 or \$775,000. Therefore, it may be inferred that Lennard opted to accept the higher of the two proposed down payments, pending the approval of plaintiffs, whose attorney made the offer without their authority. Further, three of the items on which Lennard’s acceptance was grounded rejected the corresponding items in plaintiffs’ offer. Thus, because Lennard did not unconditionally accept several items in plaintiffs’ offer, rejected a number of items in plaintiffs’ offer, and conditioned his acceptance on six items, Lennard made a counteroffer that required plaintiffs’ acceptance. See *Kamalath, supra*.

Plaintiffs’ counsel responded to Lennard’s counteroffer in a letter dated November 7, 1996. The letter states that “the sale price, down payment, interest rate, monthly installment payment and length of [land] contract have been agreed to and set out in various memorandums of sale.” There is nothing in the letter indicating that plaintiffs accepted the down payment term of \$775,000. Assuming that the above phrase constituted plaintiffs’ acceptance of that down payment term, the letter further requested clarification from Lennard about the terms of the five-year lease, the lease option owned by the cellular phone company, and the issue of the tax credits and liabilities. In effect, because plaintiffs requested clarification as to three of the items that Lennard had proposed, we conclude that plaintiffs did not accept Lennard’s counteroffer.

The second and final relevant document in this case that bears Kim Lennard’s signature is his response to plaintiffs’ November 7, 1996, letter. In a letter to Gerweck, dated November 14, 1996, Lennard specifically requested plaintiffs to be more specific about certain matters that were contained in the November 7, 1996, letter. It is evident that Lennard was waiting for plaintiffs’ acceptance of his counteroffer of September 30, 1996.

The next question is whether plaintiffs accepted Lennard's counteroffer of September 30, 1996. From our review of the documentary evidence in this case, there is nothing to show that plaintiffs accepted that counteroffer. Instead, the evidence shows that plaintiffs made several counteroffers that were not accepted by the Lennards. Therefore, the trial court correctly concluded that the documents in this case constituted only an exchange of offers and counteroffers, and that no contract for the sale of land existed.

#### B. Promissory Estoppel

Plaintiffs next argue that the trial court erred in granting defendants summary disposition of the promissory estoppel claim against the Lennards. We disagree.

The elements of a claim of promissory estoppel are: "(1) a promise; (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee; (3) which in fact produced reliance or forbearance of that nature; and (4) in circumstances such that the promise must be enforced if injustice is to be avoided." *Booker v Detroit*, 251 Mich App 167, 174; 650 NW2d 680 (2002) (citation omitted). The promise must be definite and clear. *Id.* "In determining whether a requisite promise existed, we are to objectively examine the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 687; 599 NW2d 546 (1999). The doctrine of promissory estoppel should be applied only when the facts are unquestionable and the wrong to be prevented undoubted. *Id.* A promise is "a manifestation of intention to act or refrain from acting in a specified manner, made in a way that would justify a promisee in understanding that a commitment had been made." *Schmidt v Bretzlaff*, 208 Mich App 376, 379; 528 NW2d 760 (1995).

Plaintiffs argue that the trial court failed to consider "the words and actions surrounding the transaction in question as well as the nature of the relationship between the parties and the circumstances surrounding their actions." We conclude, after review of the evidence, that the several referenced actions and conversations by the parties do not constitute any "definite and clear" promise by the Lennards to sell the property to plaintiffs. The most persuasive evidence was that a few days before the property was sold to the Neumanns, plaintiffs wired an additional deposit of \$45,000 into Gerweck's client account, and offered a \$900,000 down payment. However, this evidence fails to illustrate any promise. In her deposition testimony, Gerweck testified that Kim Lennard requested additional money from plaintiffs on the eve of the sale to the Neumanns, but she failed to mention what Kim Lennard said would have happened if plaintiffs provided the money. A reasonable inference may be made that he may have promised only to *consider* selling the property to plaintiffs. Therefore, the trial court properly dismissed the promissory estoppel claim.

#### C. Tortious Interference with Contract

Plaintiffs next allege that the trial court erred in granting defendants summary disposition of their tortious interference with a contract claim against the Neumanns. We disagree.

The elements of tortious interference with a contract are: “(1) a contract, (2) a breach, and (3) an unjustified instigation of the breach by the defendant.” *Mahrle v Danke*, 216 Mich App 343, 350; 549 NW2d 56 (1996). With respect to the third element, “[o]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *CMI Int’l, Inc v Intermet Int’l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). Here plaintiffs fail to meet the first and second requirements. As previously discussed, no contract existed in this case. Thus, the claim against the Neumanns fails as a matter of law.

#### D. Civil Conspiracy

Plaintiffs next argue that the trial court improperly dismissed their civil conspiracy claim. We disagree.

“A conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a purpose not unlawful by criminal or unlawful means.” *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966). The foundation of the action is the damage and not the conspiracy. *Roche v Blair*, 305 Mich 608, 616; 9 NW2d 861 (1943). “[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable, tort.” *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Plaintiffs argue that the Lennards and the Neumanns acted in concert to accomplish the lawful purpose of reaching a property sale agreement by utilizing the unlawful means of breaching the existing contract between the Lennards and plaintiffs. Plaintiffs allege that the facts show that the Lennards saw an opportunity to obtain a fast cash purchase from the Neumanns, and the Neumanns saw an opportunity to breach an existing contract to obtain valuable land for themselves. Plaintiffs claim that the speed with which the transaction occurred is indicative of the civil conspiracy.

As previously discussed, there was no contract in this case to breach. While it was undisputed that the Neumanns closed a multi-million dollar deal without the benefit of any title work, and that the Lennards attempted to close this deal in secret, these two actions do not constitute any actionable wrongs. See *id.* Therefore, plaintiffs’ conspiracy theory fails as a matter of law. Summary disposition of this claim was proper.

#### E. Specific Performance

Plaintiffs finally argue that the trial court abused its discretion in dismissing their specific performance claim when the documentary evidence in this case was sufficient to create a contract.<sup>2</sup> We disagree.

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<sup>2</sup> On appeal, plaintiffs do not claim entitlement to specific performance on the ground of promissory estoppel.

The power to grant specific performance is within the sound discretion of the trial court. *Zurcher, supra* at 300. Specific performance of a contract is an equitable remedy. *Rowry v Univ of Michigan*, 441 Mich 1, 9; 490 NW2d 305 (1992). The general rule is that a court will not grant specific performance unless the party seeking the decree has tendered full performance. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982). “[S]pecific performance of a contract for the purchase of real estate may not be arbitrarily refused, but in the exercise of sound legal discretion should be granted, in the absence of some showing that to do so would be inequitable.” *Zurcher, supra*. Here, as previously discussed, no contract existed from which specific performance could be awarded.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra