

STATE OF MICHIGAN
COURT OF APPEALS

PETER J. MERCIER and MAUREEN W.
MERCIER,

UNPUBLISHED
December 16, 2003

Plaintiffs-Appellees,

v

BENJAMIN J. EDWARDS and MILDRED S.
MERTEN TRUST,

No. 239898
Wayne Circuit Court
LC No. 99-912175-CK

Defendants-Appellees.

Before: Bandstra, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendants appeal from the trial court's order that a deed be reformed to incorporate restrictions in the parties' purchase agreement and to change the grantee from defendant Mildred S. Merten Trust to defendant Benjamin Edwards. We affirm in part and reverse in part.

Defendants first argue that plaintiffs waived the buy-back option they negotiated in the purchase agreement for the real property at issue here.¹ A trial court's factual findings following

¹ Although defendants did not address the issue of merger, this is the starting point for analysis of this question. "Generally, a deed executed in performance of a contract for the sale of land operates as satisfaction and discharge of the terms of the executory contract." *Chapeldaine v Sochocki*, 247 Mich App 167, 171; 635 NW2d 339 (2001). However, this rule does not apply where the deed is less than full performance of the purchase contract. *Id.* That is, where the parties make agreements collateral to the conveyance of the property that are not fully performed by the act of conveying the land, the collateral agreements do not "merge" into the deed. See *Goodspeed v Nichols*, 231 Mich 308, 316; 204 NW 122 (1925). The reason for this exception is that the purpose of a deed is to pass title – "not to describe the terms of a preceding contract under which the land was sold." *Id.* For example, in *Chapeldaine, supra* at 172, a panel of this Court held that the buyers were bound by their purchase-agreement promise to grant the seller an easement. Even though the easement was not included in the warranty deed that the seller gave to the buyers, this Court found that delivery of the deed did not fulfill the buyers' promise to the seller. *Id.* This Court reasoned that the merger doctrine did not apply because the promise could not be fulfilled until after delivery of the deed. *Id.* This same reasoning is applicable here. The buyer could not fulfill the promise to give plaintiffs an option – or any of the other purchase-

(continued...)

a bench trial are reviewed for clear error, and its legal conclusions are reviewed de novo. *Chapeldaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). A waiver exists where a party has actual or constructive knowledge of an existing right and where the party demonstrates an actual intention to relinquish that right. *H J Tucker & Assocs, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999). Waiver may be proven by either the party's express agreement or by inference drawn from the party's conduct. *Id.*

Here, there was no express agreement waiving the option, nor does plaintiffs' conduct demonstrate an intent to relinquish the right to exercise their option. Plaintiff Peter Mercier testified that he deeded the property to the trust at defendant Edwards' request, believing that this would have no effect on the purchase agreement. He was adamant that he would not have sold the property without the buy-back provision. Moreover, when he became aware of major construction on the property, he immediately wrote to Edwards reminding him of the buy-back provision. The fact that the Merciers had not previously sought to protect the option right is inconsequential as there had not previously been any indication that Edwards might not recognize it.

Defendants next argue the trial court erred in ordering reformation of the deed to change grantees and to incorporate the restrictions imposed in the purchase agreement.² We agree in part and disagree in part.

Reformation is an equitable remedy. See *Elbom v Pavsner*, 225 Mich 213, 223; 196 NW 442 (1923). A deed may be reformed to conform with the parties' intention where it fails to express "the obvious intentions of the parties." *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). In equity cases, the court's function is to "grant such relief as good conscience requires." *Walch v Crandall*, 164 Mich App 181, 191; 416 NW2d 375 (1987). Deference is given to the trial court's findings because the trial court "had the opportunity to see and hear the witnesses." *Langschwager v Pinney*, 351 Mich 473, 481-482; 88 NW2d 276 (1958). Equitable actions are subject to de novo review, but the trial court's decision "will not be reversed unless the findings are clearly erroneous or the reviewing court is convinced that it

(...continued)

agreement promises – until after the deed was delivered. For this reason, the exception to the merger doctrine applies, and the delivery of the deed did not discharge the purchase-agreement promises. See also *Goodspeed, supra*.

² Defendants failed to properly preserve their argument that the buy-back option was an unenforceable restraint on alienation. Defendants' argument in this regard was first raised on motion for reconsideration below. Although it is clear that the trial court denied that motion, the record presented to this Court on appeal fails to disclose the basis for that denial. Accordingly, finding no evidence that the trial court addressed the merits of that claim, we decline to address the argument on appeal. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999) (issues not decided by the trial court are not preserved for appeal); see also *Charbeneau v Wayne Co Gen Hospital*, 158 Mich App 730, 733; 405 NW2d 151 (1987) (a trial court does not abuse its discretion by refusing to consider legal arguments raised for the first time on a motion for reconsideration).

would have reached a different result had it occupied the position of the trial court.” *Walch, supra*.

The trial court found that all parties intended to abide by the purchase agreement’s requirement of a buy-back option. This finding is amply supported by the evidence presented in this case and reformation of the deed to effectuate the buy-back option was not clearly erroneous. However, the record does not warrant the reformation of the deed to have Edwards, rather than the Merten Trust, be the grantee. Instead, it is uncontradicted that both parties acquiesced in having Edwards purchase the property for the Trust, acting as its trustee. Plaintiffs’ only concern was that the Trust, as grantee, be bound to honor the buy-back agreement.

We reverse the trial court’s order to the extent that it reformed the deed to change the grantee. In all other regards we affirm. We remand for entry of a revised order consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Pat M. Donofrio