

STATE OF MICHIGAN
COURT OF APPEALS

KENNETH R. PODOLSKI, CRYSTAL D.
PODOLSKI, and BRANDON M. PODOLSKI,

UNPUBLISHED
January 11, 2005

Plaintiffs/Counterdefendants-
Appellants/Cross-Appellees,

v

No. 249715
St. Clair Circuit Court
LC No. 01-001371-CH

GHASSAN AZAR and CAROL AZAR,

Defendants/Counterplaintiffs/Third-
Party Plaintiffs-Appellees/Cross-
Appellants,

and

STATE OF MICHIGAN,

Defendant-Appellee,

and

FRANK KACZMAREK,

Third-Party Defendant.

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Plaintiffs appeal as of right from a bench trial judgment of no cause of action. Defendant Carol Azar¹ (“Carol”) cross-appeals from the same judgment, which dismissed her counterclaim against plaintiffs. We affirm.

During the early 1970s, plaintiff Kenneth R. Podolski (“Kenneth”), John Childs (“Childs”), and John Frisch (“Frisch”), worked together as firefighters for the City of Sterling Heights. The State of Michigan, which owned McDonald Island in Lake St. Clair, had leased the property to Childs’ uncle. In 1975, Childs’ uncle reassigned the lease to Childs and his wife, Carol, as joint tenants for \$9000. Childs and Carol contributed \$3000, Kenneth contributed \$3000, and Frisch contributed \$3000. The leased property was a single lot on which there were three cottages; Childs, Kenneth, and Frisch each selected a cottage for their families to use.

Childs testified that his intent at all times was that each family would have an equal interest in the property, and he intended that all three would be on the lease with the state. Kenneth recalls that Childs told him that they would “all be equal on the deal.” Plaintiffs allege that there was an agreement made in 1975 that gave each family an undivided one-third share in the leasehold, and that Carol and Childs were supposed to add Frisch and Kenneth to the lease as soon as possible.² Childs testified that he wrote the agreement on a piece of paper and gave copies to Frisch and Kenneth. However, Frisch testified that nothing was ever written down: “[E]verything was done with a handshake.” Frisch also testified that he always knew that he had no interest in the land, only the cottage. Although Carol recalled some sort of written agreement, she denied any knowledge of an agreement to add the other cottage owners to the lease. Instead, she alleges that the written agreement only required any of the cottage owners to offer to sell their cottage to the other two owners before accepting any other offers.

Frisch sold his cottage to another firefighter, Frank Kaczmarek (“Kaczmarek”), in 1985, and nobody disputed this transfer. Twice during the mid-1980s, Childs unsuccessfully attempted to have the Department of Natural Resources (DNR) reassign the lease to himself, Kaczmarek, and Kenneth. The DNR returned the first application because Childs had used an outdated form, and the DNR replied to the second application with a request for proof of compliance with the county sanitation requirements. Carol obtained Childs’ interest when they divorced in 1991. She married defendant Ghassan Azar (“Azar”) in July 2000.

When Kaczmarek began using his cottage less frequently, Carol and Azar wanted to purchase it for Carol’s son. Kaczmarek sold his cottage to Kenneth and his son, plaintiff Brandon Podolski (“Brandon”), in April 2001. Carol asked the court to reverse the sale of Kaczmarek’s cottage to Brandon and Kenneth because Kaczmarek did not first offer the cottage

¹ Only defendant Carol Azar claimed an interest in the disputed leasehold; the interests of the State of Michigan, the owner and lessor of the property, were not affected by this lawsuit.

² In 1974, Childs’ uncle received a notice from the Department of Natural Resources, which stated that the property could not be subdivided until the lease had been held for at least ten years.

to her. The alleged agreements involved in this lawsuit were not introduced at trial, and there was conflicting testimony about whether they ever existed, were documented, or were lost.

The trial court dismissed both claims, refusing to order Carol to convey an interest in the leasehold to plaintiffs and concluding that plaintiffs had not violated a right of first refusal agreement. The court found that there was no evidence that Carol made any agreements regarding the lease with plaintiffs. The court also found that the statutes of frauds and limitation also barred plaintiffs' claim.

I. Statute of Frauds

Plaintiffs argue that the trial court erred in finding that the statute of frauds bars their claim. We review for clear error a trial court's findings of fact from a bench trial, and we review de novo a trial court's conclusions of law. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is "clearly erroneous" if, after reviewing the entire record, we are left with a "definite and firm conviction" that a mistake has been committed, even though there is evidence to support it. *Id.*

Under the statute of frauds, a conveyance of an interest in land is void unless documented in a writing signed by the party against whom it is to be enforced. MCL 566.106. A contract to convey an interest in land other than a short-term lease must also be documented and signed by the conveyor. MCL 566.108. "[T]he historical purpose of the statute of frauds' signature requirement was to avoid situations like the instant one, where each side makes conflicting allegations regarding their oral understanding." *Zander v Ogihara Corp*, 213 Mich App 438, 445; 540 NW2d 702 (1995). The statute of frauds requires the signature of *each* holder of an undivided interest in the property being sold. *Slater Mgmt Corp v Nash*, 212 Mich App 30, 32; 536 NW2d 843 (1995), applying *Fields v Korn*, 366 Mich 108; 113 NW2d 860 (1962) (emphasis in original).

There was extensive and sharply conflicting testimony about the alleged agreement to reconvey or reassign the leasehold to add the other cottage owners. What is undisputed is that Carol and Childs were both named as co-tenants when they purchased the lease in 1975, and Carol acquired Childs' interest in their divorce settlement in 1991. Under the statute of frauds, a writing signed by Carol is required to show that Carol promised to convey or did convey any part of her interest, such as by adding plaintiffs as co-tenants on the lease. Plaintiffs' proofs clearly establish that Childs twice tried to do so without obtaining Carol's signature. Therefore, if he had succeeded in conveying part of the leasehold to plaintiffs, Carol would have had grounds to void the conveyance. As the trial court noted, "it might appear patently unfair," but we agree that Carol's statute of frauds defense is "legally correct." Given the conflicting testimony at trial, we are not left with a "definite and firm conviction that a mistake has been committed."

II. Statute of Limitations

Plaintiffs also argue that the trial court erred in concluding that their claims were barred by the statute of limitations. Whether a statute of limitations bars a cause of action is a question of law that we review de novo. *McKinney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999). A contract action accrues once there is a breach in performance sufficient to enable a claim to be filed. *AFSCME v Highland Park Bd of Ed*, 214 Mich App 182, 188; 542 NW2d 333

(1995). The limitation period applicable to a contract claim is six years after the claim accrues. MCL 600.5807(8). This Court has generally held that a cause of action for breach of contract accrues “when the breach occurs, i.e., when the promisor fails to perform under the contract.” *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 245-246; 673 NW2d 805 (2003).

Here, the court analyzed the case using the statute of limitations for contract actions, which is how plaintiffs presented their claims:

Q. THE COURT: The essence of your argument is there was a contract between three individuals to complete the process of registering assignment with the State of Michigan, and there was that contract that was performed and was lived up to. And that [because of] the failure to have Mr. Childs complete the contract, the Court should order that contract actually be fulfilled[?]

A. Correct.

Here, where plaintiffs alleged a contract with Carol and Childs “whereby it was agreed that the Podolskis (and their predecessors) would each obtain a 1/3 interest in the Subject Property in exchange for the payment of the original purchase price and their joint contribution towards the maintenance and expenses,” the statute began running not later than 1985, when plaintiffs and Childs believed that the lease could be reassigned to all the cottage owners.³ Giving plaintiffs the benefit of the doubt that their claim did not accrue at the time of the purchase and the failure to list them as co-tenants, it certainly began to run as of 1985, which is when the parties understood that the assignment could be processed.

Therefore, the trial court did not err in quieting title to the leasehold in Carol. As the court found, plaintiffs’ suit was barred by the statute of limitations. Had plaintiffs’ suit been timely, Carol would still have prevailed by virtue of the statute of frauds.

Because we affirm the trial court’s ruling that Carol is the sole owner of the leasehold, we need not address her cross-appeal on the alleged right of first refusal agreement.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs

³ Although there was no need to subdivide the property to list plaintiffs as co-tenants, there was confusion on this point, apparently resulting from the 1974 notice that the property could not be subdivided until the lease had been held for at least ten years.