

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM M. HESSELL, GERALD HESSELL
and ROBERT A. HESSELL,

UNPUBLISHED
April 6, 2006

Plaintiffs-Appellees,

v

No. 257192
Alpena Circuit Court
LC No. 03-003357-CH

JERRY C. SOCIER and CAROL L. SOCIER,

Defendants-Appellants.

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court order granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In this action, plaintiffs sought, and the trial court granted, specific performance on a land sale contract. The land in question is owned by defendants, as husband and wife, in a tenancy by the entirety. The contract at issue was signed by plaintiffs and defendant husband, but not defendant wife. Plaintiffs argued, and the trial court agreed, that defendant husband was operating as defendant wife's agent in the transaction, and therefore her signature was unnecessary.

Appellate courts review trial court decisions on motions for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) entitles the movant to summary disposition where there is no genuine issue of material fact. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding a motion, the court must consider "the pleadings, depositions, admissions, and documentary evidence" submitted by the parties in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v Henderson & Assocs Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005).

Regarding land sale contracts, the statute of frauds 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.* [MCL 566.108 (emphasis added).]

By the plain language of the statute, “a contract for the sale of land must, to survive a challenge under the statute of frauds, (1) be in writing and (2) be signed by the seller or someone lawfully authorized by the seller in writing.” *Zurcher v Herveat*, 238 Mich App 267, 277; 605 NW2d 329 (1999). Furthermore, “[c]ontracts conveying an interest in land made by an *agent* having no *written* authority are invalid under the statute of frauds.” *Forge v Smith*, 458 Mich 198, 208-209; 580 NW2d 876 (1998) (emphasis added).

In the present case, plaintiffs failed to produce any written memorandum validating the purported agency relationship between defendants, *Forge, supra*. Indeed, the proofs and arguments plaintiffs mount tending to establish such a relationship are devoid of such a writing. Given the absence of such a writing, plaintiffs have failed to establish an agency relationship sufficient to satisfy the statute of frauds. Summary disposition was improper. The plain language of the statute of frauds mandates this conclusion. MCL 566.108.

The absence of such a writing does not preclude plaintiffs’ claims entirely, however. An exception to the writing requirement authorizing an agent’s execution of a contract on behalf of the principal exists where the agent enters into such a contract in the principal’s presence and at her request; in such a case, “it is the same as if [the principal herself] had signed” the contract. *De War v Juett*, 228 Mich 84, 86; 199 NW 659 (1924). In this case, the record indicates that defendant wife was present at the March 7, 2002 contract formation, though there remains a question of fact as to whether defendant husband signed the contract at her request. A determination that defendant husband was defendant wife’s agent, with the authority to so sign on her behalf, could potentially comport with the statute of frauds. Such a determination remains a question of fact, one proper for a trier of fact to determine. *Hertz Corp v Volvo Truck Corp*, 210 Mich App 243, 246; 533 NW2d 15 (1995).

In granting summary disposition to plaintiffs, the trial court engaged in fact finding, concluding that the record evinced an agency relationship between defendants. Cf. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005) (noting that “a trial court may not make findings of fact or weigh credibility in deciding a motion for summary disposition”). Given that the court’s determination centered on the existence of an agency relationship, its grant of summary disposition was clearly erroneous; “[a]ny question relating to the existence and scope of an agency relationship is a question of fact,” one proper for a trier of fact to determine. *Hertz Corp, supra* at 246. Because questions of fact remain, summary disposition in favor of defendants was improper.

As an alternative ground for affirming the trial court, plaintiffs argue that the statute of frauds is excepted by their part performance. In arguing as such, plaintiffs rely on the provision of MCL 566.110 that the statute of frauds “shall [not] be construed to abridge the powers of the court of chancery to compel the specific performance of agreements, in cases of part performance of such agreements.”

Circumstances giving rise to part performance obviating a statute of frauds defense have frequently been in the context of partial payment conjoined with the affirmative actions of possession or improvement of the land. See *Hatch v Wolack*, 316 Mich 258, 262; 25 NW2d 191 (1946); *Bruno v Zwirkoski*, 124 Mich App 664, 669-670; 335 NW2d 120 (1983). Other circumstances have involved allegations of fraud, where the equities balance heavily in preventing misuse of the statute. Cf. *White v Lenawee Co Savings Bank*, 299 Mich 109, 115-116; 299 NW 827 (1941). Indeed, the cases cited by plaintiffs detail circumstances akin to the foregoing. See *Gardner v Gardner*, 311 Mich 615, 617-624; 19 NW2d 118 (1945) (requiring that equities weigh in favor of a party seeking specific performance, and determining that the plaintiff failed to establish fraud); *Kent v Bell*, 374 Mich 646, 652-655; 132 NW2d 601 (1965) (requiring fraud). Plaintiffs do not claim that they have taken possession of the property at issue; nor that they have paid the contract purchase price. Indeed they fail to present on appeal what circumstances in fact demonstrate their part performance. The extent of the reliance they proffered before the trial court indicates that they did not attend the land exchange hearing, they retained a surveyor for the property in dispute, and they met with defendant Jerry Socier to map the property to be conveyed. This “reliance” fails to rise to the level necessary to justify a finding of part performance. *Hatch, supra*; *Bruno, supra*. Similarly, disputed questions of fact remain as to whether defendants perpetrated a fraud on plaintiffs, justifying equitable circumvention of the statute of frauds. *Kent, supra*. Defendant husband testified, via affidavit, that he understood the parties’ agreement as embodying a preexisting arrangement whereby he would grant plaintiffs a right of way across his land, and not a contract for the sale of it. This precludes a finding of no genuine issue of material fact that defendants knew of their purported misrepresentation. *Novi v Robert Adell Children’s Funded Trust*, 473 Mich 242, 253 n 8; 701 NW2d 144 (2005); *West, supra*.

In any event, the lower court made no express findings regarding plaintiffs’ claim for specific performance; no finding that the equities weigh for or against plaintiffs. *Hatch, supra*; *Gardner, supra* at 618. Review of this issue is therefore premature; factual findings justifying the imposition or denial of specific performance based on plaintiffs’ part performance are a prerequisite to imposition of the same. See *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001); *McNamara v Horner*, 249 Mich App 177, 185-187; 642 NW2d 385 (2002); *Kent, supra*.

Reversed and remanded for further proceedings on plaintiffs’ claim. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra