

STATE OF MICHIGAN
COURT OF APPEALS

In re ESTATE OF JOSE R. HERNANSAIZ.

MARIA ISABEL HERNANSAIZ, Personal
Representative of the ESTATE OF JOSE R.
HERNANSAIZ,

UNPUBLISHED
August 13, 2020

Plaintiff-Appellant,

v

MARCO M. BISBIKIS,

No. 348729
Wayne Probate Court
LC No. 2018-841375-CZ

Defendant/Cross-Defendant-Appellee,

and

JOHN ALEXANDER,

Defendant/Cross-Plaintiff-Appellee.

Before: BECKERING, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, as personal representative of the estate of Jose R. Hernansaiz (the decedent), appeals as of right the probate court's order granting summary disposition to defendants under MCR 2.116(C)(8) and dismissing plaintiff's complaint under MCR 2.504(B)(1). We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff filed this action after becoming aware that defendant Marco Bisbikis, who is the decedent's former attorney, was claiming ownership of real property in Detroit and Salem Township that plaintiff maintained was owned by the decedent. The properties involve three adjacent parcels in Detroit, which consist of the decedent's home, a duplex next door, and a strip

of land (the Detroit property), as well as real property in Salem Township (the Salem Township property). Plaintiff alleged that she became aware that Bisbikis was claiming ownership of the properties when she hired contractors to do work on the Detroit property and discovered that there were already contractors there hired by Bisbikis.

Plaintiff subsequently learned that three quitclaim deeds, purportedly executed by the decedent and conveying the Detroit properties to Bisbikis in lieu of foreclosure, had been recorded. During subsequent telephone conversations with plaintiff's counsel, Bisbikis allegedly gave varying accounts of how he acquired title to the Detroit properties. He first told plaintiff's counsel that he had loaned the decedent \$100,000 and the real property secured the loan. Bisbikis later told plaintiff's counsel that the decedent had purchased silver bullion and rare coins, valued at \$381,000, and conveyed the Detroit properties to Bisbikis to finance that purchase.

Plaintiff's complaint contained five counts, with Count I alleging fraud or forgery, Count II alleging undue influence, Count III alleging "inadequacy of deeds," Count IV alleging a violation of the statute of frauds, and Count V alleging a "need for injunctive relief." The probate court entered a restraining order concerning the properties, and Bisbikis filed a motion for a more definite statement, arguing that plaintiff's complaint did not plead valid causes of action or comply with applicable pleading requirements in the Michigan Court Rules. Plaintiff thereafter filed an amended complaint realleging the same claims as the original complaint and adding a claim for quiet title against defendant John Alexander for the Salem Township property.¹

Bisbikis and Alexander both moved for summary disposition under MCR 2.116(C)(8). Alexander also argued that dismissal of plaintiff's complaint was warranted under MCR 2.504(B)(1) because plaintiff had not complied with various pleading requirements as ordered by the probate court. Following a hearing, the probate court determined that summary disposition of plaintiff's claims was appropriate under MCR 2.116(C)(8) and that dismissal was also appropriate under MCR 2.504(B)(1). This appeal followed.

II. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is generally reviewed de novo. *El-Khalil v Oakwood Healthcare, Inc.*, 504 Mich 152, 159; 934 NW2d 665 (2019). Defendants moved for summary disposition under MCR 2.116(C)(8). As explained by our Supreme Court::

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim

¹ It was not until after plaintiff commenced this litigation that plaintiff's counsel became aware that Bisbikis had claimed ownership of the Salem Township property, and that Bisbikis had conveyed the Salem Township property to Alexander. Alexander was permitted to intervene in the case on that basis.

is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). [*El-Khalil*, 504 Mich at 159-160.]

In considering a motion under MCR 2.116(C)(8), the plaintiff's "well-pleaded allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

MCR 2.504(B)(1) provides that "[i]f a party fails to comply with [Michigan Court Rules] or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims." This Court reviews for an abuse of discretion the probate court's decision to dismiss a case under MCR 2.504(B)(1) for failure to comply with the court's orders. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006);² *Vicencio v Ramirez*, 211 Mich App 501, 506; 536 NW2d 280 (1995). The probate court abuses its discretion "when its decision falls outside a range of reasonable and principled outcomes." *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019). When the court's reasoning results in an error of law, the court has necessarily abused its discretion. *Id.*

III. GENERAL PRINCIPLES OF LAW

The thrust of defendants' motions for summary disposition and to dismiss was that plaintiff's amended complaint did not allege valid claims under Michigan law and in compliance with the Michigan Court Rules.

MCR 2.111 provides, in pertinent part:

(A) Pleading to Be Concise and Direct; Inconsistent Claims.

(1) Each allegation of a pleading must be clear, concise, and direct.

* * *

² Plaintiff attempts to factually and procedurally distinguish this case from *Maldonado* in order to argue that the abuse-of-discretion standard is inapplicable. In that case, the trial court dismissed a lawsuit after the plaintiff and her attorneys "repeatedly and intentionally publicized inadmissible evidence so as to taint the potential jury pool, deny [the] defendants a fair trial, and frustrate the due administration of justice." *Maldonado*, 476 Mich at 376. While the facts and procedural posture of this case are distinguishable from those in *Maldonado*, the Supreme Court clearly noted that a trial court's decision to dismiss a case under MCR 2.504(B)(1) for failure to comply with the court's orders is reviewed for an abuse of discretion. This holding is not predicated on the specific facts or procedural posture of that case. Moreover, plaintiff provides no authority or analysis to suggest otherwise, or to suggest what standard of review would be applicable if not the abuse-of-discretion standard.

(B) Statement of Claim. A complaint, counterclaim, cross-claim, or third-party complaint must contain the following:

(1) *A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend; and*

(2) A demand for judgment for the relief that the pleader seeks. . . . [Emphasis added.]

Michigan is a “notice pleading” state, and this Court will read and evaluate the complaint as a whole, looking beyond “mere procedural labels” to discern “the exact nature of a plaintiff’s claims.” *Johnson v QFD, Inc*, 292 Mich App 359, 368; 807 NW2d 719 (2011). Generally, at the initial pleading stage, “notice pleading and key documents are typically sufficient to survive summary disposition under MCR 2.116(C)(8).” *Tomasik v Michigan*, 327 Mich App 660, 677; 935 NW2d 369 (2019). The dispositive inquiry is whether the allegations in the complaint, read as a whole, are sufficient “to reasonably inform” the defendant of the claims that he would be required to defend against. *Johnson*, 292 Mich App at 368.

This Court does not take lightly a trial court’s decision to dismiss an action under MCR 2.504(B)(1), and the court is required to “carefully evaluate all available options on the record” before determining that the serious sanction of dismissal is “just and proper.” *Brenner v Kolk*, 226 Mich App 149, 163; 573 NW2d 65 (1997). If the court does not consider other available options on the record, this amounts to an abuse of discretion. *Vicencio*, 211 Mich App at 506-507. Michigan’s legal system promotes the disposition of cases on their merits, and a court should weigh the following nonexhaustive list of factors before imposing the serious sanction of dismissal:

(1) whether the violation was wilful or accidental; (2) the party’s history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court’s orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. *Dean v Tucker*, 182 Mich App 27, 32-33; 451 NW2d 571 (1990). [*Vicencio*, 211 Mich App at 507.]

IV. ANALYSIS

Plaintiff argues that the probate court erred by granting defendants summary disposition of plaintiff’s claims under MCR 2.116(C)(8) and by determining that dismissal was also warranted under MCR 2.504(B)(1). We agree.

A. FRAUD

In *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012), our Supreme Court set forth the following elements of a claim for fraud:

The general rule is that to constitute actionable fraud it must appear: (1) [t]hat defendant made a material representation; (2) that it was false; (3) that when he

made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery. [*Titan Ins Co*, 491 Mich at 555 (quotation marks and citation omitted).]

In the portion of the amended complaint setting forth the factual allegations underlying plaintiff's claims, plaintiff described that, after the decedent died and plaintiff was appointed personal representative of his estate, plaintiff made repairs to the Detroit property, including remodeling a bathroom. It was only when plaintiff's contractors visited the property in August 2018 and discovered other contractors there who had been hired by Bisbikis that plaintiff became aware that Bisbikis was claiming title to the Detroit property. The amended complaint alleges that plaintiff contacted her counsel, who then contacted Bisbikis, who advised plaintiff's counsel that he had loaned the decedent \$100,000 by way of five different loans, and that the Detroit property was deeded to Bisbikis to secure the loans. According to the allegations in the amended complaint, Bisbikis did not provide proof of the loan documentation to plaintiff's counsel as requested, and Bisbikis subsequently changed his story twice: the first time indicating that the decedent had used the money loaned to him to purchase \$381,000 in silver bullion and coins from S & S Silver Brokers and that photographs of the silver would be sent to plaintiff's counsel, and the second time indicating that Bisbikis himself had sold the coins and silver to the decedent in exchange for the Detroit property. The amended complaint alleged that no documentation existed to support Bisbikis's recitation of these events.

The amended complaint also alleged that Bisbikis initially denied having an interest in the Salem Township property, but a review of the Salem Township's chain of title reflected that Bisbikis's business associate, Thomas Pascaris, had drafted a deed in which the decedent had purportedly conveyed the Salem Township property to Bisbikis on September 4, 2017, and that Bisbikis had subsequently conveyed the Salem Township property to Alexander for \$275,000 in July 2018. Plaintiff alleged that the decedent's signatures on the deeds conveying the Detroit and Salem Township properties to Bisbikis appeared to be forged.

While plaintiff provided detailed factual allegations concerning fraudulent activity on Bisbikis part, an element of actionable fraud is that plaintiff took some action in reliance of the same. *Titan Ins Co*, 491 Mich at 555. Plaintiff has not provided specific allegations explaining how she, or the estate, suffered injury by acting in reliance on Bisbikis's allegedly fraudulent claims. Accordingly, even viewing all of plaintiff's allegations in the light most favorable to her, we cannot conclude that the probate court erred when it concluded that plaintiff failed to plead an actionable claim for fraud.

B. UNDUE INFLUENCE

To sustain a claim for undue influence, "it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion" that would overpower an individual's volition, "destroy free agency and impel the grantor to act against his inclination and free will." *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), overruled on

other grounds by *In re Karmey Estate*, 468 Mich 68; 658 NW2d 796 (2003). In *Kar*, 399 Mich at 537, our Supreme Court explained:

Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, are not sufficient. *Nelson v Wiggins*, 172 Mich 191, 137 NW 623 (1912). However, in some transactions the law presumes undue influence. The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) *the existence of a confidential or fiduciary relationship between the grantor and a fiduciary*, (2) *the fiduciary or an interest which he represents benefits from a transaction*, and (3) *the fiduciary had an opportunity to influence the grantor's decision in that transaction*. [Emphasis added.]

Plaintiff alleged that the decedent, who was elderly, had retained the legal services of Bisbikis and that the two shared an attorney-client relationship. Plaintiff also alleged that the signatures on the quitclaim deeds for the Detroit properties were not that of the decedent. Alternatively, plaintiff alleged that the decedent's signatures, to the extent they were genuine, were obtained "under false pretenses" and that the decedent was told that the deeds were necessary as security for another transaction.

Whether these allegations are factually true remains to be seen, but accepting them as true and viewing them in the light most favorable to plaintiff, they are sufficient to allege that the decedent was subjected to misrepresentation and coercion under circumstances in which undue influence is presumed because (1) the decedent and Bisbikis shared a fiduciary relationship as attorney and client, (2) Bisbikis stood to benefit from that fiduciary relationship by acquiring the decedent's real property, and (3) as the decedent's legal counsel, Bisbikis was in a position to influence the decedent's decisions. See *Kar*, 399 Mich at 537.³ Viewing plaintiff's factual allegations in the amended complaint in the light most favorable to her, the probate court erred by concluding that plaintiff's claim was so clearly unenforceable as a matter of law that no factual development could justify recovery. *El-Khalil*, 504 Mich at 160; *Maiden*, 461 Mich at 119.

We note that both defendants argue that plaintiff has not presented anything more than "mere suspicion" of undue influence and that plaintiff's claim "is based upon non-existent facts." Specifically, Bisbikis argues that plaintiff has not alleged "specific fraudulent conduct or other improper actions" giving rise to the presumption of undue influence. Addressing plaintiff's factual allegation that the decedent would not have conveyed real property willingly, and that the decedent was "tricked" into conveying real property to Bisbikis, Alexander elaborates that plaintiff offers only "speculative conjecture and/or supposition devoid of fact." We disagree.

³ We note that the probate court, during the hearing on defendants' motions for summary disposition, questioned whether Bisbikis still held a fiduciary relationship with the decedent at the time of the purported conveyances, given that the duration of their professional relationship may have been short. However, such inquiries go to the factual veracity of plaintiff's claims and whether plaintiff could produce evidence to support them. Review of a claim under MCR 2.116(C)(8) is limited to the legal sufficiency of the claim.

Plaintiff's amended complaint contains factual allegations accusing Bisbikis of using his trusted position as attorney for the decedent, an elderly person in the twilight stage of his life, to gain title to the decedent's real property through false pretenses and coercion. Specifically, plaintiff has alleged that the Detroit and Salem Township properties were conveyed by the decedent to Bisbikis, his attorney, by way of quitclaim deed in lieu of foreclosure, but that documentation corroborating any alleged loans from Bisbikis to the decedent, which the properties were intended to secure, has never been produced. Plaintiff also alleged that Bisbikis's recitation of the facts regarding how he acquired title to the Detroit and Salem Township properties has repeatedly changed. Additionally, to the extent that Bisbikis asserts that "there is not even a confidential relationship alleged" between the decedent and Bisbikis, this is not accurate, given that plaintiff clearly alleged that the decedent and Bisbikis shared a fiduciary attorney-client relationship.⁴

C. INADEQUACY OF DEEDS

Next, a deed is a legal contract between the parties. *In re Ruddell Estate*, 286 Mich App 391, 402; 780 NW2d 884 (2009). In construing a deed this Court will adhere to the following legal principles:

(1) In construing a deed of conveyance[,] the first and fundamental inquiry must be the intent of the parties as expressed in the language thereof; (2) in arriving at the intent of parties as expressed in the instrument, consideration must be given to the whole [of the deed] and to each and every part of it; (3) no language in the instrument may be needlessly rejected as meaningless, but, if possible, all the language of a deed must be harmonized and construed so as to make all of it meaningful; (4) the only purpose of rules of construction of conveyances is to enable the court to reach the probable intent of the parties when it is not otherwise

⁴ In support of their argument that mere suspicion of undue influence will not suffice to withstand a motion for summary disposition under MCR 2.116(C)(8), both defendants rely on *In re Spillette's Estate*, 352 Mich 12; 88 NW2d 300 (1958). In that case, following a jury trial, the jury found in favor of the plaintiff, but the probate court entered "a judgment non obstante veredicto" in favor of the defendants. *Spillette's Estate*, 352 Mich at 14. The Supreme Court was asked to decide whether "there was sufficient evidence of fraud and undue influence" for the case to reach the jury, a question that would implicate the factual sufficiency of a claim, which in the context of summary disposition would be evaluated under MCR 2.116(C)(10) (no genuine issue of material fact), rather than under MCR 2.116(C)(8), which only considers the legal sufficiency of a claim. After considering the evidence presented, the Court observed, first, that mere suspicion of undue influence will not suffice to set aside the last will and testament of a person of sound mind and memory, and second, the record evidence did not establish that the decedent did *not* wish to make and leave a last will and testament. *Id.* at 15-18. Because *Spillette's Estate* involved an evaluation of whether evidence that had been adduced was factually sufficient to present the case to a jury, and by contrast, this Court is tasked here only with deciding whether the factual allegations in plaintiff's amended complaint, if accepted as true, are such that additional factual development could justify recovery, *El-Khalil*, 504 Mich at 160, defendants' reliance on that case is misplaced.

ascertainable. [*Michigan Dep't of Nat Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 370; 699 NW2d 272 (2005) (citation and quotation marks omitted).]

Under Michigan law, when a grantor conveys property by way of a quitclaim deed, he or she “conveys any and all right, title, and interest that a grantor has in the lands described in the deed.” *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 630; 752 NW2d 479 (2008). Notably, however, the delivery of a deed is not valid unless there was “a conveyance of a present interest in the land.” *Blodgett v Snobble*, 295 Mich 374, 377; 295 NW 192 (1940). See also *Casgrain v Hammond*, 134 Mich 419, 430-431; 96 NW 510 (1903) (explaining that one cannot convey an interest that one does not presently have).

Plaintiff challenged the validity of the quitclaim deeds in lieu of foreclosure on the basis that the deeds were not based on valid mortgages between the decedent and Bisbikis. One of the ways in which the validity of a deed can be challenged is if it is the result of forgery.

A forged deed is invalid. It conveys nothing, and the recording statutes afford no protection to an innocent, bona fide purchaser for value, because he or she acquires no rights under the forged deed. Thus, an innocent purchaser for value under a forged deed is in no better position as to title than if he or she had purchased with notice. [7 Mich Civ Jur, Deeds of Conveyance § 84 (2020).]

Another way in which the validity of a deed can be challenged is “by showing that the deeds were procured by means of fraud or undue influence.” 7 Mich Civ Jur, Deeds of Conveyance, § 90 (2020). With respect to fraud:

Between the grantor and grantee and other interested parties having actual notice, a deed of conveyance is voidable at the option of the grantor if induced by fraud practiced on the grantor, or if executed under duress or undue influence exerted on him or her, but actions to void deeds of conveyance based on any of the grounds of fraud, duress or undue influence will not prevail against subsequent innocent, good faith purchasers for value without notice.

The proof of an assertion of fraud necessarily depends on the particular facts established in each case, and few general rules or precedents can be established. Establishing precedent for the determination of fraud is nearly impossible and it is recognized that previous decisions are of little assistance in determining the question of whether the grantor’s act in executing the conveyance was his or her own conscious, intelligent, and free act, since each case rests on its own facts. [*Id.*]

With respect to undue influence:

A grantor who has been unduly influenced does not have the requisite intent to execute the deed. However, a deed executed as a result of undue influence practiced on the grantor is also voidable rather than void, and if, before the grantor takes steps to avoid the deed, the grantee therein conveys the premises to an innocent purchaser, a court of equity will extend protection to such purchaser.

Undue influence constitutes an equitable ground for cancellation of a deed. [7 Mich Civ Jur, Deeds of Conveyance § 92 (2020) (emphasis added).]

As noted earlier with respect to the analysis of plaintiff's allegations of fraud and undue influence, plaintiff has specifically alleged in detail that Bisbikis (1) engaged in fraud with respect to the transactions resulting in the conveyance of the Detroit and Salem Township properties to Bisbikis, and (2) unduly influenced and coerced the decedent, with whom he had a professional attorney-client relationship. Plaintiff has also alleged that the decedent's signatures on the quitclaim deeds were forged. These allegations, accepted as true and viewed in a light most favorable to plaintiff, *El-Khalil*, 504 Mich at 160; *Maiden*, 461 Mich at 119, provide legal grounds that, if factually supported, would establish that the quitclaim deeds are invalid.

Plaintiff also challenged the validity of the deed of the Salem Township property from Bisbikis to Alexander on the basis that it conveyed two separate pieces of property. Alexander points out that the November 4, 1997 warranty deed that conveyed title to the Salem Township property to the decedent also conveyed title to both parcels of the Salem Township property. In any event, while the ultimate success of plaintiff's claim challenging the legal description of the quitclaim deed for the Salem Township property may be dubious given that Alexander has correctly pointed out that the decedent received title to the same two parcels in the November 4, 1997 warranty deed that was conveyed to him, that inquiry relates to the factual sufficiency of plaintiff's claim, not its legal sufficiency. And, to the extent that plaintiff is challenging the validity of the quitclaim deed on the basis that Bisbikis acquired title to the Salem Township property under circumstances amounting to undue influence, fraud, and coercion, but is also questioning which parcels of property were in fact conveyed, Michigan law does recognize a cause of action to reform a deed on the basis of fraud. See *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 372; 761 NW2d 353 (2008) (recognizing that "Michigan courts sitting in equity have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise.").

Again, at this stage, it cannot be said that plaintiff's claim challenging the validity of the quitclaim deeds is so clearly unenforceable that no factual development could possibly justify recovery. *El-Khalil*, 504 Mich at 160. Accordingly, the probate court erred by holding that plaintiff had not alleged a valid claim challenging the validity of the deeds, and therefore, erred by granting defendants' motions for summary disposition with respect to Count III of plaintiff's amended complaint.

D. STATUTE OF FRAUDS

MCL 566.106 provides:

No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

This Court has interpreted this statute to require that a writing transferring an interest in land be both certain and definite, and the “parties, property, consideration, and time of performance must be included.” *In re Skotzke Estate*, 216 Mich App 247, 249; 548 NW2d 695 (1996). A mortgage is an interest in land that is subject to the statute of frauds. *Schultz v Schultz*, 117 Mich App 454, 457; 324 NW2d 48 (1982).

Part of the probate court’s reasoning for dismissing this claim was its conclusion that violation of the statute of frauds is not an actionable claim in and of itself, but instead it is an affirmative defense. The probate court appeared to be persuaded by defendants’ reliance on *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 80-81; 443 NW2d 451 (1989), wherein this Court considered whether the trial court properly denied the defendants’ motion for a directed verdict on a claim alleging breach of a lease. In affirming the trial court’s decision, this Court stated that “[t]he statute of frauds is an affirmative defense that is not only invoked to prevent fraudulent construction of a written contract, but also to prevent disputes over what provisions were included in an oral contract.” *Id.* at 82. However, while recognizing that the statute of frauds may be pleaded as an affirmative defense, *Jim-Bob* does not stand for the proposition that a plaintiff may not affirmatively challenge the validity of an agreement on the basis that it is not enforceable under the statute of frauds. See *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 527; 644 NW2d 765 (2002) (noting that, although the statute of frauds is often used to defend against the enforcement of a contract, there is “no reason not to apply the doctrine . . . where [a] plaintiff wield[s] the statute of frauds as a sword and not as a shield.”)

Importantly, “the Statute of Frauds generally may be invoked by anyone against whom a contract is sought to be enforced.” Mich Civ Jur, Statute of Frauds, § 170 (2020). Moreover, 2 Longhofer, Michigan Court Rules Practice, Forms, § 52.15 (2019), provides a mechanism by which a plaintiff may sue to recover funds paid on an agreement to sell land that is void because it did not comply with the statute of frauds. In any event, while plaintiff captioned Count IV of her amended complaint as “violation of statute of frauds,” the underlying legal substance of her claim is to challenge the *validity* of the mortgage that Bisbikis claims allowed him to receive a quitclaim deed in lieu of foreclosure.⁵ Accordingly, because plaintiff alleged facts that, accepted as true and viewed in her favor, raise an issue whether the alleged mortgage giving rise to the quitclaim deeds in lieu of foreclosure was enforceable under MCL 566.106, the probate court erred by granting defendants’ motion for summary disposition with respect to this claim.

⁵ Defendants argue on appeal, as they did in the probate court, that summary disposition in their favor was proper because the quitclaim deeds were writings that satisfied the statute of frauds, and the probate court agreed. Again, however, plaintiff was not challenging the validity of the quitclaim deeds on the basis that the deeds themselves did not satisfy the statute of frauds, but on the basis that the deeds referenced an underlying mortgage that was invalid for failure to comply with the statute of frauds, thereby affecting the validity of the deeds. Each deed indicated that it was issued “in lieu of foreclosure on a Loan dated 1-14-2016, between the parties *on the described property*.” Defendants do not address whether the underlying mortgage interests in the properties—which served as the basis for allowing Bisbikis to receive deeds to the properties in lieu of foreclosing on the alleged property interests—satisfied the statute of frauds.

E. QUIET TITLE ACTION

Lastly, with respect to plaintiff's claim for quiet title, we disagree with the probate court's conclusion that the amended complaint was deficient for failing to comply with statutory and court-rule requirements. MCL 600.2932(1) provides:

Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

Similarly, MCR 3.411 provides, in pertinent part:

(A) This rule applies to actions to determine interests in land under MCL 600.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.

(B) Complaint.

(1) *The complaint must describe the land in question with reasonable certainty by stating*

(a) *the section, township, and range of the premises;*

(b) *the number of the block and lot of the premises; or*

(c) *another description of the premises sufficiently clear so that the premises may be identified.*

(2) The complaint must allege

(a) *the interest the plaintiff claims in the premises;*

(b) *the interest the defendant claims in the premises; and*

(c) *the facts establishing the superiority of the plaintiff's claim.* [Emphasis added.]

First, as the probate court directed in its December 11, 2018 order, plaintiff, citing MCL 600.2932, added Alexander as a defendant. Additionally, plaintiff complied with MCR 3.411(B)(1)(a) to (c) by including the legal descriptions of both the Detroit and Salem Township properties, and, as required by MCR 3.411(B)(2)(a) to (c), she alleged the basis for her interest in the properties as personal representative of the decedent's estate, as well as the basis for Alexander's interest because of the conveyance by Bisbikis.

Both defendants argue, as they did in the probate court, that plaintiff also failed to satisfy the requirements of MCR 3.411(C), which provides, in pertinent part:

(C) Written Evidence of Title to Be Referred to in Pleadings.

(1) Written evidence of title may not be introduced at trial unless it has been sufficiently referred to in the pleadings in accordance with this rule.

(2) The plaintiff must attach to the complaint, and the defendant must attach to the answer, a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record.

Indeed, neither the complaint nor amended complaint included a statement of the title on which plaintiff relied. However, in support of her answer to Bisbikis's motion for summary disposition, plaintiff provided a November 4, 1997 warranty deed in which title to the Salem Township property was conveyed to the decedent by Omar Chamie. On March 5, 2019, plaintiff filed her statement of title in which the estate claimed its interest in the Salem Township property by way of that warranty deed. We acknowledge that plaintiff did not provide a copy of the conveyance that conveyed title of the Detroit property to the decedent. However, although plaintiff failed to provide information required by the court rule and the probate court had ordered plaintiff to comply with MCR 3.411 when filing her amended complaint, we are not persuaded that this deficiency rises to the level of "egregious conduct" that warranted dismissal under MCR 2.504(B)(1). See *Brenner*, 226 Mich App at 163. This is particularly so because the parties never disputed that the decedent held title to the subject properties. Instead, the key issue was whether Bisbikis and Alexander properly acquired title to the properties from the decedent before his death.

Moreover, before deciding to dismiss the amended complaint for failure to comply with all of the requirements of MCR 3.411, the probate court did not weigh the factors relevant to plaintiff's failure to comply with its earlier court order, or evaluate other less drastic options, one of which would have been to order plaintiff to produce a statement of title, as she did for the Salem Township property, on which the estate relied to establish the decedent's title. See *Vicencio*, 211 Mich App at 507; *Brenner*, 226 Mich App at 163 (recognizing that dismissal is an "extreme measure" and before it is imposed the court must carefully weigh all other potential options on the record before determining that the sanction of dismissal is both "just and proper.") Accordingly, the probate court abused its discretion by dismissing, under MCR 2.504(B)(1), the count in plaintiff's amended complaint requesting that the court quiet title to the properties. See *Vicencio*, 211 Mich App at 506-507 (holding that if the court does not consider other available options on the record, this amounts to an abuse of discretion).

V. CONCLUSION

Apart from her claim of actionable fraud, the claims set forth in plaintiff's amended complaint were not so clearly unenforceable as a matter of law that no factual development could support recovery. Accordingly, the probate court erred by dismissing the claims under MCR 2.116(C)(8). The probate court likewise abused its discretion by dismissing the amended complaint on the basis of its conclusion that dismissal was warranted under MCR 2.504(B)(1).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro