

STATE OF MICHIGAN
COURT OF APPEALS

BARRY R. BESS, Receiver of Certain Real
Property of DOUGLAS D. ELLIARD,

UNPUBLISHED
August 31, 2001

Plaintiff-Appellee,

v

No. 221752
Oakland Circuit Court
LC No. 96-524069-CH

WILLIAM J. GREER,

Defendant-Appellant.

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered in favor of plaintiff following a bench trial in this action to quiet title. We affirm.

Defendant argues that the trial court's findings of fact were both insufficient and clearly erroneous, and that its legal conclusions were in error. We review a trial court's findings of fact for clear error. MCR 2.613(C); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). A finding is clearly erroneous when, although evidence may exist to support the finding, this Court is left with a definite and firm conviction that a mistake has been made. *Id.* In applying the clearly erroneous standard, regard is given to the special opportunity of the trial court to judge the credibility of witnesses. MCR 2.613(C); *In re Forfeiture of \$19,250*, 209 Mich App 20, 29; 530 NW2d 759 (1995). Findings of fact are sufficient if it appears that the trial court was aware of the issues involved in the case and correctly applied the law. *LaFond v Rumler*, 226 Mich App 447, 458; 574 NW2d 40 (1997). This Court reviews a trial court's conclusions of law de novo. *Walters, supra*.

First, the trial court's finding that the deed in question was not intended as an absolute conveyance was not clearly erroneous. As a general rule, the delivery of a deed is essential to pass title to real estate. *Resh v Fox*, 365 Mich 288, 291; 112 NW2d 486 (1961). The object of the delivery requirement is to indicate the grantor's intent to give effect to the instrument. *Id.* As such, whether a delivery occurred involves the intention of the grantor as evidenced by the surrounding circumstances, and the test is whether the delivery of the deed conveyed a present interest in the property. *Id.*; *Gilmer v Anderson*, 34 Mich App 6, 10; 190 NW2d 708 (1971). The physical delivery of the deed to the grantee raises a presumption of an intent to pass title. *Resh*,

supra at 291-292. However, the presumption is not conclusive and may be rebutted. *Id.* at 292. The subsequent conduct of the parties may be taken into consideration in determining whether there existed an intent to pass title. *Id.*

Here, while Douglas Elliard physically transferred the deed to defendant in June 1993, the subsequent conduct of the parties demonstrated that no intent to pass title existed at the time of the purported transaction. The record shows that defendant failed to record the deed immediately following the conveyance or at any time thereafter because he wanted to allow Elliard time to repay the money owed to defendant. Defendant also failed to obtain an insurance policy on the premises and failed to pay property taxes on the property until ordered to do so by the court. In addition, the property continued to be listed under Elliard's name in the Holly Township tax rolls until 1996.

Moreover, subsequent to the purported conveyance, Elliard's son lived on the property for nearly two years without paying rent to defendant. While Elliard maintained that defendant approved of the tenancy, defendant testified that he never gave Elliard's son permission to live on the premises, although he did not object to Elliard's son living there. Elliard also transferred various legal files to the premises for storage in 1995 or 1996, and, as of November 1997, various business and personal records of Elliard were still located on the premises. Because the subsequent conduct of Elliard and defendant reveals that there was no intent to pass title to the property to defendant in June 1993, *Resh, supra* at 291-292, we conclude that the trial court did not clearly err in finding that the deed did not constitute an absolute conveyance. Furthermore, because the record shows that the trial court was aware of the issues involved and correctly applied the law, its findings were sufficient. *LaFond, supra*.

Next, we conclude that trial court's finding that the deed did not constitute an equitable mortgage was not clearly erroneous. *Schultz v Schultz*, 117 Mich App 454, 457-458; 324 NW2d 48 (1982). A court may declare a deed absolute on its face to be an equitable mortgage. *Id.* at 457. An equitable mortgage may exist where a conveyance vests the grantee with the right to bring an action for foreclosure in the event that the obligation of the grantor is not performed. *State Bar Grievance Administrator v Van Duzer*, 390 Mich 571, 577; 213 NW2d 167 (1973). In such cases, the pecuniary embarrassment of the grantor, his indebtedness to the grantee, and the inadequacy of consideration are circumstances evidencing the true character of the conveyance. *Grant v Van Reken*, 71 Mich App 121, 126; 246 NW2d 348 (1976).

Here, there was conflicting evidence regarding the amount and the circumstances of Elliard's debt to defendant. While both parties testified that they had initially agreed that defendant would be paid \$30,000 for his work on the premises, defendant maintained that Elliard had paid him only \$9,000, and Elliard testified that he paid defendant the entire \$30,000, but owed between \$8,000 and \$10,000 for additional work performed. Defendant, however, testified that Elliard owed him \$12,000 for his additional services, as well as \$34,000 which defendant had loaned to Elliard. At Elliard's deposition, he denied borrowing any money from defendant, but he testified at trial that he owed defendant \$32,000 which defendant had loaned to him. Moreover, when plaintiff contacted defendant shortly before filing this lawsuit to inquire as to the circumstances of the deed, defendant mentioned that he had performed some repair work on the premises, but failed to mention that Elliard owed him money as a result of a cash loan. In

addition, although Elliard testified that they had executed a written contract evidencing their \$30,000 agreement, the contract was not produced at trial. We conclude that the trial court did not clearly err in finding that the testimony regarding the nature of Elliard's alleged indebtedness to defendant lacked credibility and that the deed in question did not constitute an equitable mortgage. Furthermore, because the trial court was aware of the issues involved and correctly applied the law, its findings with respect to this issue were sufficient. *LaFond, supra*.

The trial court further found that there was no actual delivery of the deed to defendant because the deed was subject to recall. We conclude that this finding was clearly erroneous. The evidence showed that Elliard physically conveyed the original deed to defendant in Elliard's office in June 1993. No evidence was presented that the deed was subject to recall. While Elliard approached defendant in 1995 or 1996 and asked for a copy of the deed, such action did not render the deed subject to recall at the time that it was transferred in 1993. The fact that a deed is subsequently returned to the physical custody of the grantor does not render the original delivery of the deed invalid. *Lintner Estate v Meier*, 344 Mich 119, 124-125; 73 NW2d 205 (1955). While the trial court found that Elliard recorded the deed after he "repossessed" it in 1995 or 1996, no evidence that Elliard recorded the deed was presented. Furthermore, although defendant testified at his deposition that he was holding the deed as security, he also testified at his deposition and at trial that Elliard conveyed him the property in order to settle and resolve Elliard's indebtedness to him.¹ Therefore, the trial court's finding that no actual delivery of the deed occurred because the deed was subject to recall was clearly erroneous.

In addition, the trial court erred in finding that any debt arising out of defendant's improvements to the property could not be enforced as a matter of law because defendant was not a licensed contractor. Where a party seeks an equitable remedy against an unlicensed builder who has performed residential construction work on property, and the circumstances indicate that equity requires that the builder be paid for his labor, the party seeking equity must first do equity by compensating the builder. *Republic Bank v Modular One LLC*, 232 Mich App 444, 453; 591 NW2d 335 (1998). Plaintiff filed suit against defendant to quiet title and urged the lower court to declare the conveyance an equitable mortgage if the court found that a valid delivery had occurred. Therefore, although defendant was an unlicensed contractor, he would have been entitled to compensation had the circumstances of this case constituted an equitable mortgage. *Republic Bank, supra*. However, because the deed did not constitute an absolute conveyance, and the circumstances did not give rise to an equitable mortgage, the trial court properly found that all right, title, and interest in the property was held by plaintiff.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper

¹ Defendant's deposition transcript was admitted as evidence at trial.