STATE OF MICHIGAN

COURT OF APPEALS

KENT CHARLES HYNE,

Plaintiff-Appellant,

v

MILTON POOL and DEITLINDA POOL,

Defendants-Appellees.

UNPUBLISHED
April 13, 2004

No. 245690
Washtenaw Circuit Court
LC No. 00-001155-CH

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

In this breach of contract action arising out of the alleged sale of real property, plaintiff appeals as of right from the trial court's order, following a nonjury trial, finding no cause of action and dismissing the case. We affirm.

Sometime in 1998, the parties began discussing the sale of a portion of defendants' real property to plaintiff. Plaintiff maintains that by the end of August of that year, the parties had reached an agreement that defendants would sell to him approximately thirty-one acres for $250,000, to be paid through a ten-year mortgage with an interest rate of six percent. Plaintiff, without the help of a real estate or legal professional, drafted a sales agreement. This agreement, which the parties executed on August 31, 1998, included a description of the property and indicated the purchase price, but did not reference the specific mortgage payment terms.

In October 2000, defendants informed plaintiff that they no longer wished to sell the property to him, and instead were planning to sell the property to someone else. During that same month, plaintiff filed this action alleging breach of contract and seeking specific performance or unspecified damages.

After a two-day trial, the trial court ruled that the terms regarding the mortgage were critical to this agreement, and therefore, for purposes of satisfying the statute of frauds, must be in the written agreement. The court further determined that "plaintiff has not been able to show an adequate meeting of the minds." Accordingly, an order of dismissal was entered.

On appeal, plaintiff argues, in essence, that the trial court erred in failing to use the memo containing the proposed terms of the credit sale, which plaintiff refers to as the payment-term memorandum, to supplement and fill in the missing terms of the sales agreement, therefore bringing it into compliance with the statute of frauds. We disagree.

In an action seeking equitable relief, the trial court's holdings are reviewed de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). However, the trial court's findings of fact in an equity action are reviewed for clear error. MCR 2.613(C); *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Bynum v The ESAB Group, Inc*, 467 Mich 280, 285; 651 NW2d 383 (2002).

In relevant part, MCL 566.108 states:

> 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[.]

See also MCL 566.106. To survive a challenge under the statute of frauds, a contract for the sale of land must "(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). The statute of frauds does not specify what terms must be contained in a writing to make it enforceable. *Kojaian v Ernst*, 177 Mich App 727, 730; 442 NW2d 286 (1989). When a contract for the sale of land on its face evidences deferred payments, "it must state with reasonable certainty the substance of the payment terms." *Tucson v Farrington,* 396 Mich 169, 174; 240 NW2d 464 (1976); *Zurcher, supra* at 282. This rule is founded on the principle that when certain terms are missing from a contract, the court will suppose that the parties intended reasonable terms. See *Kojaian, supra* at 731. However, when the parties indicate that they intend a credit sale but fail to set forth the terms and times of payments, a court's ability to impose reasonable terms is absent and such a contract is unenforceable. *Id.*

Michigan courts, however, allow extrinsic evidence for the purpose of supplementing, though not contradicting, a writing that may otherwise fail under the statute of frauds. See *Opdyke Investment Co v Norris Grain Co,* 413 Mich 354, 367; 320 NW2d 836 (1982). Accordingly, the fact that the writing did not contain the specific terms regarding the mortgage may not be fatal if there is extrinsic evidence available that supplements the writing and supplies the missing terms. However, a question of fact remains as to whether an agreement was actually reached by the parties. *Opdyke Investment, supra* at 366 n 9. There must be evidence that the agreement was reached at the time the writing was signed and not subsequent thereto. *Tucson, supra* at 174-175. Here, the trial court made the factual finding that the parties did not reach an agreement with regard to the terms of the credit sale. On appeal, it is, in essence, this factual finding that plaintiff challenges.

At trial, defendants offered evidence that supports the trial court's finding that the parties did not reach a meeting of the minds regarding the mortgage. There is testimony from defendant Mr. Pool stating that he was not given the mortgage memo until after they had signed the purchase agreement. Defendant Mrs. Pool, who was present for the signing of the purchase agreement, stated that the first time she saw the mortgage memo was in her attorney's office after the litigation had begun. Mr. Pool also testified that he believed that the sale was subject to determination of a price other than what was listed. Further, the unsigned mortgage memo talks

about "proposed" income and costs. Accordingly, we find no clear error in the trial court's factual determination that the extrinsic evidence did not support the finding that the parties had an agreement.

Plaintiff next argues that certain actions of defendants, including allowing plaintiff to build and use a horse corral in defendants' front yard, amount to part performance and therefore relieve the contract from the requirements of the statute of frauds.

Part performance of an agreement may be sufficient to remove the agreement from the statute of frauds. *Giordano v Markovitz*, 209 Mich App 676, 679; 531 NW2d 815 (1995), citing *McDonald v Scheifler,* 323 Mich 117; 34 NW2d 573 (1948); *Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971). However, the trial court's findings here went beyond the question of whether the statute of frauds was satisfied. Instead, the trial court found that factually a contract did not exist between these two parties (there was no meeting of the minds). Accordingly, even if the statute of frauds did not apply here, it would not save the contract, as the trial court found that there was no contract at all. See *Zurcher, supra* at 279 (explaining the oftentimes blurred distinction between the form and substance requirements of a contract for the sale of land: "The *substance* of a binding contract for the sale of land is a subject separate from its sufficiency under the statute of frauds and one that is governed by the general contract law concept that there must be a meeting of the minds regarding the 'essential particulars' of the transaction."). Therefore, plaintiff's argument here must fail.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot