STATE OF MICHIGAN

COURT OF APPEALS

LINDA HARKNESS, Successor in Interest to ERWIN KESTERKE, Plaintiff-Appellee,	UNPUBLISHED December 4, 2012
v GAIL W. BRICKMAN and COVERT RESORT ASSOCIATION, Defendants-Appellants.	No. 305769 Van Buren Circuit Court LC No. 10-060086-CZ

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying defendants' motion for summary disposition and granting summary disposition in favor of plaintiff. We affirm.

For many years, the Covert Resort Association ("CRA") has owned a plot of land consisting of numerous individual lots. The CRA functioned similarly to a condominium in that it issued to its original shareholders or "founding families" certificates of ownership for the various lots. Plaintiff's mother, Jacqueline Kesterke, was a descendant of one of these founding families and, until the early 1990's, owned many of the lots. In about 1992, Jacqueline and her husband Erwin Kesterke, along with Orley M. Vaughan, acting on behalf of the founding families, conveyed their collective interest in a large number of lots to the CRA for $1,700 per lot. This conveyance was memorialized in a vendor's affidavit. The Kesterkes still retained several lots after the 1992 conveyance, however. Some years later, pursuant to an oral agreement, the Kesterkes conveyed their remaining lots ("the property") to the CRA. As a result of this conveyance, the CRA assumed the tax payments for the property and the Kesterkes no longer paid dues to the CRA. There was no written memorialization of this agreement. Erwin contended that the oral agreement included a term allowing Jacqueline or Erwin or their heirs to regain ownership of the property at a future date by reimbursing the CRA for the tax payments that the CRA made on the property while in possession. Jacqueline died some years after the conveyance of the property, and in 2008, Erwin assigned his interest in the property to plaintiff. Erwin died shortly thereafter. Plaintiff wanted to reimburse the CRA for its tax payments and regain the property. The CRA refused this request, contending that the oral agreement never included any provision whereby the Kesterkes or their heirs could regain the property.

Plaintiff sued the defendants for specific performance, seeking the enforcement of the agreement. Defendants moved for summary disposition under MCR 2.116(C)(8) and (10), arguing, in part, that the agreement was not in writing and, thus, any reconveyance provision would be unenforceable under the statute of frauds. Plaintiff then amended her complaint and sought to have the trial court declare invalid the original transfer of the property to the CRA under the statue of frauds. Plaintiff moved for summary disposition pursuant to MCR 2.116(I)(2) and MCR 2.116(C)(9) and (10). The trial court granted summary disposition in favor of plaintiff, finding that the transfer of the property to the CRA was void for failure to comply with the statute of frauds, invalid consideration, and no meeting of the minds.

Defendants argue that the trial court erred by denying their motion for summary disposition and granting summary disposition in favor of plaintiff. We disagree. "We review de novo the decision of the trial court on the motion for summary disposition." *Jimkoski v Shupe*, 282 Mich App 1, 4; 763 NW2d 1 (2008). Likewise, "[w]hether a statute of frauds bars enforcement of a contract is a question of law that we review de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 458; 733 NW2d 766 (2006). Because the trial court relied on material beyond the pleadings, we review the trial court's grant of summary disposition under MCR 2.116(C)(10). *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id*. The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

"The statute of frauds was designed to prevent disputes as to what the oral contract, sought to be enforced, was." *In re Rudell Estate*, 286 Mich App 391, 407; 780 NW2d 884 (2009) (quotation omitted). "In Michigan, the sale of land is controlled by the statute of frauds. The statute of frauds, in regards to the sale of land, is comprised of MCL 566.106 and MCL 566.108." *Lakeside Oakland Dev, LC v H & J Beef Co*, 249 Mich App 517, 524; 644 NW2d 765 (2002) (citation omitted).

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.

MCL 566.108 provides:

> Every contract . . . 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 . . . sale is to be made, or by some person thereunto by him lawfully authorized in writing . . . .

"Simply put, therefore, 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). In this case, it is undisputed that the Kesterkes attempted to transfer an interest in land to the CRA pursuant to an oral agreement without anything in writing. Accordingly, under the statute of frauds, the transfer of the property to the CRA was void. MCL 566.106; MCL 566.108.

But a party's part performance on an otherwise void, oral contract can be sufficient to remove the agreement from the statute of frauds. Under the doctrine of part performance, "[i]f one party to an oral contract, in reliance upon the contract, has performed his obligation thereunder so that it would be a fraud upon him to allow the other party to repudiate the contract, by interposing the statute, equity will regard the contract as removed from the operation of the statute." *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540; 473 NW2d 652 (1991) (quotation omitted); see also *Giordano v Markovitz*, 209 Mich App 676, 679; 531 NW2d 815 (1995). Further, the party's performance must be substantial and important, and the act constituting partial performance must be prejudicial to the performing party. *White v Walper*, 299 Mich 109, 115; 299 NW 827 (1941); *Hazime v Martin Oil of Ind, Inc*, 792 F Supp 1067, 1070 (ED Mich, 1992). In this case, it was uncontroverted that the CRA benefitted from possession of the property, and payment of the taxes enabled them to continue to enjoy possession. They did not pay a purchase price for the property, and the record does not indicate that the CRA made any substantial improvements to the property. Moreover, plaintiff's complaint sought to reimburse defendants for the tax payments that they made, and the trial court's order required plaintiff to make such a payment. Under these facts, we conclude that the application of the statute of frauds is warranted because defendants' part performance was not so prejudicial to justify removing the oral agreement from the statute of frauds. See *White*, 299 Mich at 115; *Lakeside Oakland Dev, LC*, 249 Mich App at 526-527 ("The statute of frauds exists for the purpose of preventing fraud or the opportunity for fraud . . . ."). Given the application of the statute of frauds, we conclude that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law. Thus, we need not address the trial court's additional grounds for summary disposition, i.e., no valid contract for want of consideration and meeting of the minds.

Defendants also argue that plaintiff lacks standing. The determination of whether a party has standing is a question of law that is reviewed de novo. *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 492; 726 NW2d 755 (2006). We note that the argument defendants bring forth on appeal is different from the argument they presented in their motion for summary disposition at the trial court. In their motion for summary disposition, defendants based their argument that plaintiffs lacked standing on the assertion that the terms of the oral agreement precluded plaintiff from "regaining" the property. On appeal, given that the trial court ruled that the oral agreement was void, defendants now argue that plaintiff lacks standing because, even though Edwin assigned his interests to plaintiff, she failed to establish that Edwin had any rights to transfer to her in the first place. Specifically, defendants note that Edwin's wife Jackie possessed the rights to the property at the time of the attempted transfer to CRA; thus, they contend that it is not clear that if after her death, those rights fell to Edwin. Thus, the issue is not preserved, and we decline to address it. *Midwest Bus Corp v Dep't of Treasury*, 288 Mich App 334, 351; 793 NW2d 246 (2010).

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly