STATE OF MICHIGAN

COURT OF APPEALS

ROBBIN HARSH,

Plaintiff-Counterdefendant-Appellant/Cross-Appellee,

v

SCOTT SYKORA and JULIANNE SYKORA,

Defendants-Counterdefendants-Appellees/Cross-Appellants,

and

JERALD L. RUSSELL and SHARON A. RUSSELL,

Defendants-Counterplaintiffs-Appellees.

UNPUBLISHED
March 5, 1999

No. 206011
Isabella Circuit Court
LC No. 96-009477 CK

Before: Jansen, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order entering judgment in favor of defendants[1] and dismissing his claims. Defendant Sykoras cross appeal the court's denial of their request for attorney fees and costs pursuant to MCR 2.405 and MCL 600.2591; MSA 27A.2591. We reverse and remand.

On appeal, plaintiff first argues that the trial court erred in ruling that the proposed contract for the sale of land was not a sufficient writing evidencing the agreement, and that the property description was inadequate, and therefore barred by the statute of frauds.

A trial court's determination as to whether the statute of frauds bars enforcement of a purported contract is a question of law that this Court reviews de novo. *Zander v Ogihara Corp*, 213 Mich App

438, 441; 540 NW2d 702 (1995). The statute of frauds, as it relates to the conveyance of an interest in land, is set forth in MCL 566.106; MSA 26.906, which 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 in writing.

In addition, the statute of frauds, as it relates to contracts for an interest in land, is set forth in MCL 566.108; MSA 26.908, which provides, in pertinent part:

> Every contract for the . . . sale of 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 . . . .

The purpose of these statutes is not only to prevent fraud or the opportunity for fraud between contracting parties, but also to prevent disputes over the terms of an oral agreement. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 82; 443 NW2d 451 (1989).

Moreover, case law suggests that in order for a writing to comport with the statute of frauds, it must be certain and definite. *In re Skotzke Estate*, 216 Mich App 247, 249; 548 NW2d 695 (1996). In other words, the writing must generally contain the parties, property, consideration, and time and manner of performance in order to transfer the interest in land. *Id.* Nonetheless, the Supreme Court has recently adopted a case-by-case approach for determining compliance with the statute of frauds, rather than applying a fixed set of rules. *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998).

In resolving this issue, we find the parties' and the trial court's reliance on *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982), appropriate. However, our interpretation of *Opdyke* and its application to the facts in this matter differs from that applied by the trial court. The Supreme Court rejected the archaic "nothing in parol" rule applied in earlier cases involving the statute of frauds, noting that the "nothing in parol" rule "had been so dishonored in this Court that it has lost any claim to legitimacy." *Id.* at 366-367. Instead, the Court adopted the following principle:

> [E]xtrinsic evidence may be used to supplement, but not contradict the terms of the written agreement. In the absence of extrinsic supplemental evidence, the court may infer that the parties intended a "reasonable" or "good faith" term as part of the contract. [*Id.* at 367.]

Accordingly, the Court rejected the narrow and rigid rule for compliance with the statute of frauds, and espoused a more liberal and permissive standard. *Id.* at 368.

In this case, the parties' dispute essentially focuses on two factors: whether a negotiable instrument satisfies the writing requirement of the statute, and whether the property description provided on the check, without reference to extrinsic evidence, is adequate under the statute. First, we find the trial court's ruling that the negotiable instrument must be viewed with greater scrutiny than would be afforded another written document solely because it is a check, inaccurate. To the contrary, we find no support in the statute of frauds or accompanying case law that suggests a court should discriminate between types of memorandum or documents when all the essential elements of the agreement are contained on the written instrument. Accordingly, we find no authority for the court's decision to apply a stricter scrutiny to the check, for no other reason than the fact that it is a negotiable instrument, and we hold that this was an improper standard by which to evaluate the issue. See *Barton v Molin*, 219 Mich 347, 350; 189 NW 74 (1922).

Turning next to the issue of whether the property description noted on the face of the check was adequate under the statute, we look first to the instrument itself. The check stated, "1/4 Thayer prop" in the memo section. The trial court's concern with respect to this description pertained to the lack of specificity and the inability to particularly identify what one-quarter of the property was at issue, as well as in what county it was situated, and what Thayer property was referenced, assuming there was more than one. The court ultimately concluded that the description was inadequate, and found that the "check fail[ed] in terms of setting forth the essential terms and reducing those to writing."

At the onset, we would agree with the trial court that it would be difficult to identify the property at issue based solely on that description. However, we must not ignore the controlling precedent authorizing the introduction of extrinsic evidence to clarify a particular term of a contract, and requiring each case to be considered based on its own particular facts and circumstances. See *Forge, supra* at 198; *Opdyke, supra* at 354. In fact, the use of extrinsic evidence in similar circumstances as those presented here to supplement an otherwise potentially inadequate property description was endorsed years ago by the Supreme Court. See *Goldberg v Mitchell,* 318 Mich 281, 286; 28 NW2d 118 (1947); *Cramer v Ballard*, 315 Mich 496, 503; 24 NW2d 80 (1946); *Wozniak v Kuszinski*, 352 Mich 431; 90 NW2d 456 (1958).

After a review of the record here, we are convinced that the circumstances presented required the admission of extrinsic evidence before a proper decision could be made regarding the adequacy of the property description noted on the check. For instance, the parcel of land referred to by both parties as the "Thayer property" was well-known not only by the parties, but by all who resided in the community as well as the city officials who were contributing to the increase in the value of the land. Indeed, the property was the subject of great debate and concern to the City of Clare at the time this transaction occurred, particularly because the city was contemplating acquiring a portion of the land upon which to build a road. In addition, the parties' close familial relationship, and the effect that it had on the transaction, should not be overlooked.

Plaintiff and Scott Sykora were brothers-in-law, and Sykora took advantage of plaintiff's financial stability by soliciting a contribution for the land, implying that plaintiff would benefit tremendously from the investment. Furthermore, testimony from the parties regarding their agreement shows a mutual understanding of the location, size, and description of the property upon which the

transaction was based. Finally, the amount for which the check from plaintiff to Scott Sykora was written for a one-quarter interest in the property, when compared to the entire amount for which the property was purchased, further demonstrates what portion of the property was at issue. Based on this additional evidence, that was not considered by the trial court before rendering its decision, the trier of fact could conclude that the negotiable instrument contained an adequate description of the property. In any event, we conclude that the trial court erred in ruling on the issue without considering the extrinsic evidence plaintiff sought to introduce, contrary to the law in this state.

In light of this conclusion, we reverse the decision of the trial court and remand for additional proceedings whereby the court must consider extrinsic evidence submitted from both parties on the issue in deciding the issue.

Plaintiff next argues that the trial court erroneously dismissed his fraud claim on the basis that the contract was unenforceable under the statute of frauds. Plaintiff suggests that the court failed to recognize that the fraud action is a separate and distinct viable claim irrespective of whether the underlying contract is enforceable. We agree.

At the conclusion of defendants' presentation of proofs, the trial court determined that the alleged contract was unenforceable under the statute of frauds for the above noted reasons. At the same time, and without considering additional evidence or arguments from plaintiff, the court summarily dismissed the fraud claim as well on the basis that, without an enforceable contract, there could be no fraud perpetrated by defendants. While the court briefly announced that it did not find that a misrepresentation of fact had been made, it focused predominantly on the fact that the statute of frauds precluded a fraud claim because there was no enforceable contract.

We find the trial court's decision and rationale unpersuasive. Plaintiff alleged a fraud claim based on a false representation as defined in SJI2d 128.01, which sets forth the necessary elements as follows:

> a. Defendant made a misrepresentation of fact.
>
> b. The representation was false when it was made.
>
> c. Defendant knew the representation was false when he made it, or he made it recklessly, that is, without knowing whether it was true.
>
> d. Plaintiff relied on the representation.
>
> e. Plaintiff was damaged as a result of his reliance.

There is nothing in this definition that requires the existence of an enforceable contract in order to prove fraud. To the contrary, the tort action for fraud is not at all dependent on whether the purported contract was enforceable; rather, the dispositive issue is whether defendant Scott Sykora falsely represented to plaintiff that he would transfer one-quarter of the Thayer property to plaintiff in exchange for the amount tendered, and then instead transferred the property to the Russells for substantially less

than fair market value, knowing that the value of the property had enhanced dramatically, in an effort to deceptively eliminate plaintiff's interest in the land entirely and remove him from the chain of title, resulting in financial damages to plaintiff. Indeed, the fraud claim is a distinct tort action, irrespective of whether the underlying contract is enforceable. See *Northern Plumbing & Heating, Inc v Henderson Bros, Inc*, 83 Mich App 84, 93; 268 NW2d 296 (1978).

Therefore, in light of our conclusion that the fraud claim is separate and distinct from the breach of contract action, we hold that the trial court erred in summarily dismissing plaintiff's fraud claim without at least allowing him to introduce evidence on the issue. The court's bare conclusion that there was no factual misrepresentation without hearing any evidence or arguments on the matter, and without articulating any factual or legal basis for its conclusion, was improper. Accordingly, we reverse the dismissal of the fraud allegation and remand for a trial to determine the merits of the claim.

Turning to the issues raised on cross appeal, those issues are moot in light of our disposition of the above issues. Defendants, of course, may again raise the issue of fees and costs in the trial court if on remand they again prevail. We offer no opinion on whether they are entitled to such an award.

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

/s/ Kathleen Jansen
/s/ David H. Sawyer

[1] Defendants Russells do not challenge the trial court's rulings, nor do they raise any issues on appeal. Accordingly, we will refer to the Sykoras as defendants, and the Russells by name, where appropriate.