STATE OF MICHIGAN

COURT OF APPEALS

DONALD P. METZGER COOK,

Plaintiff-Appellee,

v

MASON C. COOK and JEWEL COOK,

Defendants-Appellants.

UNPUBLISHED
February 11, 2000

No. 215453
Tuscola Circuit Court
LC No. 97-015595-CH

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment ordering defendants to convey a parcel of real property to plaintiff, subject to specified terms and conditions. We affirm.

This case arises out of an alleged oral agreement between the parties that defendants would convey a parcel of real property to plaintiff after plaintiff repaid certain debts. Plaintiff contended that the parties had an agreement that after plaintiff paid defendants' mortgage in full, including repayment of their $6,000 contribution to the down payment, and after plaintiff paid a debt that plaintiff's brother owed to defendant Mason Cook, plaintiff was to receive title to the property.

First, defendants contend that the trial court erred in concluding that plaintiff's claim was not barred by the statute of frauds. We find no error. This Court reviews de novo whether the statute of frauds bars enforcement of a purported contract. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). MCL 566.108; MSA 26.908 provides in pertinent part:

> 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 . . . .

It is a well-established rule that partial performance of an oral contract to convey real property may remove the contract from the statute of frauds. *Zaborski v Kutyla*, 29 Mich App 604, 607; 185 NW2d 586 (1971); *Boelter v Blake*, 307 Mich 447, 450-451; 12 NW2d 327 (1943); MCL

566.110; MSA 26.910. However, payment of the purchase price alone is insufficient to remove the contract from the statute. *Daugherty v Poppen*, 316 Mich 430, 439; 25 NW2d 580 (1947); *Pearson v Gardner*, 202 Mich 360, 362; 168 NW 485 (1918). The question before us is whether plaintiffs, by their acts in making partial payment, taking possession and changing the character of the premises, have performed sufficiently "to take the case out of the statute and to equitably entitle plaintiff to the decree for specific performance which was awarded by the court below." *Pearson*, *supra* at 362. For example, in *Pearson*, our Supreme Court held that part performance occurred where one party made payments, took possession of the property, harvested vegetables, trimmed some trees, removed a wall inside a house, and moved the location of a kitchen sink. Here, plaintiff contributed $4,000 to defendants' down payment and he made defendants' monthly mortgage payments. Plaintiff also built a dog kennel on the property that defendant and his girlfriend used as a sanctuary while attempting to place dogs in new homes and cleared some trees from the property. The improvements to the property, coupled with the thousands of dollars that plaintiff paid defendant or on defendant's behalf from 1988 to 1997, lead us to conclude that the trial court properly found that, in light of plaintiff's part performance, his claim was not barred by the statute of frauds.

Next, defendants contend that the trial court erred in ordering defendant Mason Cook to specifically perform the alleged agreement between the parties. On appeal of a suit for specific performance, this Court reviews the trial court's ultimate determination de novo and the findings of fact supporting that determination for clear error. *Samuel D Begola Services Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). A finding is clearly erroneous if the reviewing court, based on all the evidence, is left with a definite and firm conviction that a mistake has been made. *Id*. "In order to have specific performance of an oral contract for conveyance of land, plaintiff not only has the burden of proving the alleged oral contract, but also must prove that his acts of performance in pursuance of the claimed oral contract have been to an extent and of a kind to create such strong equities in his favor that courts of equity should not permit the statute of frauds to be used as an instrument to defeat the oral contract." *Gardner v Gardner*, 311 Mich 615, 618; 19 NW2d 118 (1945). Here, plaintiff testified that he and Mason Cook agreed that plaintiff would make defendants' monthly mortgage payments, pay the property taxes, and insure the property. Plaintiff further testified that the agreement between the parties was that after Mason Cook's mortgage was paid in full, including repayment of Mason Cook's $6,000 contribution to the down payment, and after plaintiff paid another debt of $1,200 that plaintiff's brother owed to Mason Cook, plaintiff was to receive title to the property. We conclude that specific performance was an appropriate remedy in this case. Furthermore, given these facts, we are not left with a definite and firm conviction that the trial court made a mistake.

Next, defendants contend that the equities of the case weigh in their favor. We disagree. Specific performance is an equitable remedy, and the trial court has discretion whether to order it. *Edidin v Detroit Economic Growth Corp*, 134 Mich App 655, 660; 352 NW2d 288 (1984); *Wilhelm v Denton*, 82 Mich App 453, 455; 266 NW2d 845 (1978). The testimony adduced at trial revealed that plaintiff has lived on or near the property since 1961 and made improvements on it, whereas defendants only visited the property every few years. Plaintiff made every monthly mortgage payment except for one, contributed $4,000 to Mason Cook's down payment, and paid some of the property taxes; yet, plaintiff received none of the annual payments of $3972 from the Conservation

Reserve Program. Under these facts, we cannot conclude that the trial court abused its discretion when it ordered Mason Cook to reconvey the property to plaintiff.

Next, defendants contend that the trial court erred in ordering specific performance against defendant Mason Cook's wife, Jewel Cook. We disagree. In resolving this issue, we seek guidance from our Supreme Court's opinion in *Boelter*, *supra* at 451, in which the Court held that a spouse who failed to sign a written option to purchase a parcel of real property was nevertheless bound by it because she acquiesced to the option. Specifically, the non-signing spouse: did not object to the offeree's repairs and alterations to the property; did not indicate to the offerees that she would consider the option void; discussed the option with the offerees before her husband signed it; and knew about a plan of monthly payments that were to be made by the offerees. *Id*. at 450-451. Similarly, Jewel Cook knew about the agreement to reconvey. Plaintiff testified that Jewel Cook thought it was "nice" that Mason Cook was helping plaintiff. Plaintiff also testified that he told Jewel Cook in a telephone conversation that after he paid his debts to Mason Cook, he wanted to have the property returned to him, and that Jewel Cook did not disagree. Defendants did not rebut plaintiff's testimony that Jewel Cook knew about the agreement and did not object to it, she accepted plaintiff's down payment, and she benefited from his monthly mortgage payments. Furthermore, Mason Cook testified that Jewel took care of much of his business, and that she probably received plaintiff's $4,000 contribution toward defendants' $10,000 down payment. In light of *Boelter*, *supra*, the evidence in the present case supports a finding that Jewel Cook acquiesced to the agreement between plaintiff and Mason Cook. Consequently, we conclude that the trial court did not err in ordering specific performance against Jewel Cook.

Finally, defendants contend that the trial court erred in finding that the doctrine of res judicata did not apply in this case. We disagree. On appeal, we review de novo whether res judicata will bar a subsequent suit. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). The United States Bankruptcy Court for the Northern District of California confirmed defendants' plan of reorganization under 11 USC 1101 *et seq*. (Chapter 11) on June 3, 1994, more than two years before plaintiff filed his complaint in the present case. Where the prior action occurs in federal court, the applicability of res judicata is determined under federal law. *Id*. at 378 n 8. In *Sanders Confectionery Products v Heller Financial*, 973 F2d 474, 480 (CA 6, 1992), the court stated the four elements of res judicata, or claim preclusion, as follows:

> 1. A final decision on the merits in the first action by a court of competent jurisdiction;
>
> 2. The second action involves the same parties, or their privies, as the first;
>
> 3. The second action raises an issue actually litigated or which should have been litigated in the first action;
>
> 4. An identity of the causes of action.

The doctrine of res judicata is properly applied in the bankruptcy context of an order confirming a plan of reorganization, but only if all four elements are met. See *B R Eubanks, MD v FDIC*, 977 F2d

166,169 (CA 5, 1992). While "[a]n order confirming a plan of reorganization is res judicata as to all questions that were raised or could have been raised during the debtor's Chapter 11 case," *Snyder v United States*, 213 BR 321, 323 (ED Mich, 1997), we find nothing in the record to establish that plaintiff's claim was raised during the Chapter 11 case. Furthermore, defendants have provided no authority to support the proposition that plaintiff's claim could have been raised during the Chapter 11 case and have failed to address the other elements necessary to apply the doctrine of res judicata as identified in *Sanders*. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). Accordingly, based on the record before us, we conclude that the bankruptcy court's order confirming defendants' Chapter 11 plan was not res judicata as to plaintiff's claim.

Affirmed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot