

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH PAVLOVICH and TEVIS PAVLOVICH,

Plaintiffs-Appellees,

v

JAMES W. CASHEN and GAIL A. CASHEN,

Defendants-Appellants.

UNPUBLISHED

March 7, 2000

No. 214735

Washtenaw Circuit Court

LC No. 97-008883 CH

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

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition in favor of plaintiffs. We reverse and remand for proceedings consistent with this opinion.

Plaintiffs and defendants entered into a contract for the sale of land.¹ The agreement provided that the purchase price was \$57,000. The agreement did not specify the type of title which would transfer. The agreement addressed the time of closing as:

3. If this offer is accepted by the Seller and if title can be conveyed in the condition required hereunder, the Purchaser agrees to complete the sale within ten days after delivery of the commitment of title insurance or abstract; . . .

The agreement also contained the following contingency:

This offer to Purchase, is subject to perk test, acceptable to the Washtenaw County Health Dept. and the Purchaser's. Perk test to be completed within thirty days from date of acceptance of this offer by the Seller's. Cost of testing to be paid by the Seller's.

Although documentary evidence was not submitted to substantiate the assertion, defendants contend, and plaintiffs do not dispute, that the perk test contingency was satisfied. However, in the course of closing the transaction, a survey was performed that revealed an encumbrance upon the property. Plaintiffs contend that defendants, through their real estate agent, Ed Hood, offered to "remove the

encroachment or otherwise solve the problem.” Defendants’ pleadings are silent regarding how the process to remove the encroachment began. Defendants state that inquiry was made to determine whether a structure could be built upon the property with the existing encroachment. Defendants contend that this inquiry was necessary because plaintiffs intended purpose in purchasing the property was to build a retirement home upon the land. When it was learned that a building could not be constructed on the property with the encroachment present, steps were taken to obtain sufficient acreage to meet the zoning building requirements. Defendants allege that three deeds were executed among neighboring landowners in order to allow plaintiffs to put the property to plaintiffs’ intended use. Defendants further alleged that after two years had passed, they had expended substantial funds to obtain two acres of property, and the property had increased in value. Despite these efforts, the purchase agreement allegedly was still unable to be consummated because of issues regarding resurveying the properties, the issuance of title insurance for the various properties, and mortgage approval of the transactions. Therefore, defendants, through a letter sent by their attorney, canceled the contract. Plaintiffs commenced this lawsuit seeking specific performance of the contract. That is, plaintiffs sought to purchase the property as described in the purchase agreement despite the encumbrance. There is no evidence presented that plaintiffs made any demand to consummate the sale prior to the commencement of this litigation or tendered the purchase price to defendants.

Plaintiffs moved for summary disposition in the trial court. Specifically, plaintiffs alleged that a valid purchase agreement, which complied with the statute of frauds, should be enforced. Plaintiffs also alleged that defendants could not “stall” performance of the contract in an attempt to escape the obligations of the purchase agreement. Finally, plaintiffs attached a portion of a hornbook which addressed specific performance and requested that remedy for defendants’ cancellation. In support of summary disposition, plaintiffs submitted a copy of the purchase agreement, copies of letters exchanged between counsel for each party, and copies of portions of the hornbook mentioned above. Plaintiffs also submitted an affidavit wherein they stated that they were “ready, willing and able to complete the transaction.”

Defendants also moved for summary disposition. Defendants asserted that plaintiffs were not entitled to the equitable remedy of specific performance because they did not come before the trial court with clean hands. That is, plaintiff did not take any steps to proceed with the closing despite entering into the purchase agreement in March 1995. Plaintiffs’ delay in seeking specific performance precluded that remedy because the legal description given in the purchase agreement no longer existed, and plaintiffs would obtain a windfall for their failure to timely pursue this equitable remedy. Defendants also requested summary disposition based on plaintiffs’ failure to tender payment to defendants, failure to consummate the sale in a timely manner when time was of the essence, and failure to request specific performance in a timely manner where performance of the contract was now impossible. In support of summary disposition, defendants submitted copies of surveys conducted in July 1995, and December 1996, and an affidavit of Hood. Hood’s affidavit provided that plaintiffs “did not offer to purchase the property unless it was buildable.”

The trial court granted summary disposition in favor of plaintiffs. Specifically, the trial court held:

I am going to find that there is no genuine issue of material fact here. There was a valid binding agreement for the sale of real property. The seller [defendants] could not deliver that parcel because of an encroachment. At that point the buyer [plaintiffs] could have rescinded the agreement, could have sought damages from the seller. But that was not a right that the defaulting seller had at that point. The buyer agreed and the seller undertook to remedy the defect. In effect the seller did over this period of time, but now the seller attempts to rescind the contract to take advantage of what was, in fact, his default originally. Any right to assert a title defect as a grounds to rescind the contract was the buyers and not the sellers.

Under these circumstances it's clear to me that the plaintiffs are entitled to specific performance of the contract to sell. I will grant the plaintiffs' motion for summary disposition and judgment for specific performance. I'll deny the defendants' motion for summary disposition.

The trial court did not address the issues raised by the parties on appeal, but rather, held that the right to rescind the contract belonged solely to plaintiffs. However, review of the purchase agreement reveals that defendants were to convey title "in the condition required hereunder." The purchase agreement did not specify the type of title which was to transfer. When the contract is silent as to title, the title shall be marketable. *Frederick v Hillebrand*, 199 Mich 333, 344; 165 NW 810 (1917). The trial court held that defendants could not rescind the contract based on title defects. Review of the purchase agreement reveals that the trial court's holding is erroneous. The purchase agreement provided under a section entitled "Title Objections" that "[i]f the Seller [defendants] is [are] unable to furnish satisfactory title within the time specified, the deposit shall be refunded forthwith in full termination of this agreement." Accordingly, the trial court erred in granting summary disposition to plaintiffs when it concluded that defendants had no legal rights upon learning that the property was encumbered.

However, defendants also were not entitled to summary disposition based on this same provision. While there was a written contract to purchase the land in dispute, it appears that the parties orally allowed for an attempt to cure the encumbrance. To this end, the parties have failed to meet their respective burdens regarding the cross-motions for summary disposition. MCR 2.116(G)(4) provides that the moving party must identify the issues where there exists no disputed issue of fact. Once the motion is made and supported, the adverse party may not rest upon mere allegations or denials, but must demonstrate that a genuine issue for trial exists. MCR 2.116(G)(4). When deciding a motion for summary disposition, the trial court may not make factual findings or weigh the credibility of witnesses. *Morris v Allstate Ins Co*, 230 Mich App 361, 364; 584 NW2d 340 (1998). In support of summary disposition, plaintiffs submitted an affidavit wherein they averred that they were "ready, willing and able to complete the transaction." However, plaintiffs' affidavit fails to satisfy their burden of proof. Mere conclusory allegations in an affidavit, which are devoid of detail, is insufficient to satisfy the burden. *Quinto v Cross & Peters Co*, 451 Mich 358, 372; 547 NW2d 314 (1996). For example, plaintiffs failed to indicate whether they ever expressed their intention to purchase the property subject to the contingencies and failed to indicate how they were ready, willing and able to consummate the sale. It is

unknown whether plaintiffs had obtained the necessary financing or had the financial resources available to close the sale. Furthermore, we note that summary disposition is suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276; 514 NW2d 525 (1994). Where the truth of a material factual assertion of a moving party is contingent upon credibility, a genuine issue for the trier of fact exists and summary disposition should not be granted. *Id.* In the present case, plaintiffs assert that they were ready, willing and able to complete the transaction. Plaintiffs also do not dispute that their intention in purchasing the property was to build a retirement home. Defendants assert, and plaintiffs do not dispute, that the zoning board would not allow construction on the land because the encumbrance caused the acreage of the property to comprise less than two acres. Accordingly, plaintiffs' contention that they were "ready, willing and able" to complete the purchase when the condition as existed would fail their essential purpose is a credibility question for which summary disposition is inappropriate. *Vanguard, supra.*

Likewise, defendants contend that summary disposition should have been granted in their favor based on the various issues raised on appeal. However, those issues are not preserved for appellate review because they were not addressed and decided by the trial court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997). While we will not punish a litigant for omissions by the trial court, *Carson, Fisher, Potts & Hyman v Hyman*, 220 Mich App 116, 119; 559 NW2d 54 (1996), the issues presented by defendants do not present questions of law for which all necessary facts have been presented. *Id.* While defendants assert that certain events occurred in the zoning proceeding, certain testimony was given in deposition, and title to the property was still unclear due to the uncertainty of title insurance and mortgage approval, defendants did not preserve in the lower court record the documentary evidence for our review. MCR 2.116(G)(4), (G)(5). Additionally, while defendants may have a valid claim that plaintiffs are precluded from obtaining specific performance due to plaintiffs' unclean hands in failing to request that the sale transpire, the deposition testimony of plaintiffs in which they allegedly acknowledged their failure to act has not been submitted. We also question the trial court's grant of specific performance. Review of the prayer for relief in plaintiffs' complaint reveals that plaintiffs' requested an award of the property with the encumbrance. It also appears that this request may be impossible because defendants have executed or caused to be executed three deeds which changed the configuration and description of the property. Accordingly, the trial court must consider whether plaintiffs' alleged failure to act caused an impossibility of performance such that plaintiffs could no longer obtain this remedy or other remedy due to their inaction over a nearly three year period. Furthermore, the trial court failed to balance the equities of the appreciation in value of the property where defendants changed the acreage of the property to allow plaintiffs' intended purpose. Accordingly, we reverse the trial court's order granting summary disposition in favor of plaintiffs and remand for proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

¹ Both parties state that the date of the agreement occurred on March 8, 1995. The purchase agreement itself provides that the date of the agreement was # [sic]-8-95.