

STATE OF MICHIGAN
COURT OF APPEALS

DONNA JEAN HORAK,

Plaintiff-Appellant,

v

RICK J. GOODWIN,

Defendant-Appellee.

UNPUBLISHED

June 16, 2000

No. 212685

St. Clair Circuit Court

LC No. 97-000504-NZ

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

JANSEN (concurring in part and dissenting in part).

I agree with the majority that the claims of fraud, equitable mortgage, and assault and battery were all properly dismissed by the trial court. I respectfully dissent from the affirmance of the dismissal of the breach of contract claim. I would find that plaintiff has both properly pleaded a claim for breach of contract and that she has presented sufficient evidence to withstand a motion brought under MCR 2.116(C)(10). I would reverse the trial court's ruling on the breach of contract claim and remand this case for further proceedings.

The facts of this case are that the parties began living together in 1981 and, although they never married, they had two daughters together. They purchased property in Kimball Township through a land contract on May 13, 1983, for \$14,900. Only defendant's name appears on the land contract as the purchaser. In 1988, a mortgage was obtained and the land contract was paid off, but the mortgage still remained. According to plaintiff, she received Social Security disability checks on a bi-weekly basis and those checks were deposited directly into a joint savings account for fourteen years. Defendant would withdraw the funds from the account and apply them toward the land contract and later the mortgage. Plaintiff also claims that she made other financial contributions to the property, in a total amount of about \$53,000. The parties' relationship ended in June 1994. Plaintiff maintains that they never married because, had she married defendant, her Social Security disability checks would have ended and they needed her income. When the parties' relationship ended, defendant took a motor home and left the premises, while plaintiff and the two daughters remained in the house. Plaintiff then signed a lease to rent the property beginning on July 1, 1994, for \$375 a month. In August 1994, however, plaintiff and her two daughters moved out. Defendant later sold the property, and the proceeds were in excess of \$71,000.

With respect to the breach of contract claim, the complaint alleges that plaintiff's Social Security disability checks were deposited into a joint savings account at the Educational and Associates Credit Union and that pursuant to their agreement, defendant would withdraw the funds to pay the mortgage payments (about \$300 a month). The complaint also alleges that plaintiff made other financial contributions and remodeling improvements to the property. Plaintiff further alleges in the complaint that defendant made assurances to her that she would have a co-interest in the real estate, so she continued to make payments on the property. Defendant, however, was the only person listed on the mortgage, and he later sold the property after the parties' relationship ended, and he is claiming all the proceeds.

It is true that common-law marriages are not valid in this state and the Legislature has abolished a breach of contract to marry action. *Carnes v Sheldon*, 109 Mich App 204, 211; 311 NW2d 747 (1981). Although this state will not enforce contracts made in consideration of meretricious relationships, the existence of a meretricious relationship does not render all agreements between the parties to be illegal. *Id.*; *Hierholzer v Sardy*, 128 Mich App 259, 262; 340 NW2d 91 (1983). Thus, an agreement made during a meretricious relationship will be enforced upon proof of additional independent consideration. *Featherstone v Steinhoff*, 226 Mich App 584, 588; 575 NW2d 6 (1997). "[W]here there is an express agreement to accumulate or transfer property following a relationship of some permanence and an additional consideration in the form of either money or services, the courts tend to find an independent consideration." *Tyranski v Piggins*, 44 Mich App 570, 573-574; 205 NW2d 595 (1973). The agreement must either be express or implied in fact; recovery will not be permitted based on a contract implied in law or quantum meruit because to do so would essentially resurrect common-law marriage. *Featherstone, supra*, p 588; *Carnes, supra*, pp 215-216; *Roznowski v Bozyk*, 73 Mich App 405, 408-409; 251 NW2d 606 (1977).

The evidence, taken in a light most favorable to plaintiff in this case, indicates that the property was purchased by a land contract on May 13, 1983, for \$14,900. Plaintiff testified at her deposition that defendant's father gave them \$1,000 for the down payment as a gift. The property was purchased in defendant's name only and plaintiff saw the land contract when defendant first brought it home. Plaintiff testified at her deposition that the agreement between the parties was that her Social Security disability checks were deposited into a joint savings account at defendant's credit union and that this money was used to make the monthly payments (first on the land contract and later on a mortgage). Plaintiff also testified that she contributed financially because some of her money was used to improve the property and that she and defendant worked to improve the property together. Plaintiff testified that defendant would tell her that she was entitled to half of everything and half of the property was hers. Essentially, it was plaintiff's testimony that her money was used for the house payments, while defendant's money was used for day-to-day living expenses.

On the authority of *Tyranski*, *Roznowski*, and *Hierholzer*, I would find that there is a genuine issue of a material fact regarding whether an agreement and independent consideration existed such that plaintiff is entitled to half of the proceeds of the property that the parties resided in for eleven years with their two daughters. There is evidence that plaintiff contributed financially to the property and she alleges that defendant informed her that half of the property was hers. I would note, too, that the trial court, in its written opinion, failed to take the evidence and reasonable inferences in a light most favorable to plaintiff, and it does not accurately state plaintiff's deposition testimony. Further, the trial

court incorrectly concluded that the lease was evidence that plaintiff knew she had no interest in the property because there is evidence to the contrary regarding this claim.

I would reverse the trial court's ruling regarding the breach of contract claim¹ and remand for further proceedings.²

/s/ Kathleen Jansen

¹ The exemplary damages claim would still be properly dismissed even if the breach of contract claim was revived because exemplary damages may not be recovered in a breach of contract action absent allegation and proof of independent tortious conduct which is not alleged here. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401, 420-421; 295 NW2d 50 (1980).

² To the extent that there is any concern regarding a statute of frauds issue, defendant did not plead this defense in his answer to the complaint, thus, it is waived. MCR 2.111(F)(2).