

STATE OF MICHIGAN
COURT OF APPEALS

GLORIA ROGERS,

Plaintiff/Counterdefendant-Appellee,

v

TYRONE PATTERSON,

Defendant/Counterplaintiff-Appellant.

UNPUBLISHED
September 8, 2000

No. 211703
Wayne Circuit Court
LC No. 97-716243-CZ

Before: Kelly, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

In this property dispute, defendant appeals as of right from an order granting summary disposition to plaintiff. We reverse.

The property at issue is a residence located in Detroit that had been previously owned by defendant's mother and step-father. Defendant asserts that he wanted to buy the home when his mother and step-father decided to sell it in 1993, but was unable to obtain financing. According to defendant, plaintiff was then approached and agreed to serve as a "strawman" for the transaction. The sale to plaintiff was subsequently accomplished, and plaintiff continues to hold legal title to the property. Defendant claims that plaintiff was to hold the property in trust until defendant could obtain financing in his name. Defendant further claims that he paid the earnest money deposit, all closing costs, and all mortgage payments, including taxes and insurance from 1993 up to November 1996.

In October 1996, plaintiff filed a complaint in the district court for non-payment of rent. Defendant responded with a counter-complaint seeking the imposition of a constructive trust. Defendant also filed a motion to remove his counter-complaint to the circuit court based on lack of jurisdiction. That motion was granted. Thereafter, plaintiff filed her motion for summary disposition in the circuit court. Plaintiff argued that summary disposition under both MCR 2.116(C)(8) and (10) was required because defendant's counter-claim was barred by the statute of frauds. Plaintiff also argued that she should be granted summary disposition under MCR 2.116(C)(9) on her claim for non-payment of rent. The trial court summarily dismissed defendant's counter-claim, finding that he had failed to "submit enough evidence to create a genuine issue of material fact." There is no indication in the record that the trial court ruled on plaintiff's (C)(9) motion.

Defendant first argues that the trial court erred in summarily dismissing plaintiff's cause of action seeking the imposition of a constructive trust. We agree. Although plaintiff's motion to dismiss the counter-claim was premised on MCR 2.116(C) (8) and (10), because the trial court examined evidence outside the pleadings when rendering its decision, the issue will be reviewed under the standard of review applicable to (C)(10) motions. *Kubisz v Cadillac Gage Textron, Inc.*, 236 Mich App 629, 633, n 4; 601 NW2d 160 (1999).

A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

A constructive trust allows a plaintiff to recover an asset even though he does not hold legal title to it. The notion of a constructive trust is premised on the belief that although the defendant has legal title to the asset, the plaintiff should recover the asset because the plaintiff has a superior equitable claim to the asset. Dobbs, *Law of Remedies* (2d ed), § 4.3(2). In *Arndt v Vos*, 83 Mich App 484, 487; 268 NW2d 693 (1978), this Court described the concept in this manner:

Constructive trusts are creatures of equity and their imposition makes the holder of the legal title the trustee for the benefit of another who in good conscience is entitled to the beneficial interest. They are distinguished from express and resulting trusts in that they do not arise by virtue of agreement or intention, but by the operation of law. Constructive trusts, while infinite in their variety, are imposed only where it would be inequitable to do otherwise. [Citations omitted.]

In cases involving the transfer of real property, the constructive trust doctrine is impacted by the application of the statute of frauds. The statute of frauds provision applicable here 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. [MCL 566.106; MSA 26.906.]

The purposes behind the statute of frauds would be effectively undermined if a plaintiff could resort to the legal fiction of a constructive trust simply because a verbal promise had been made by a defendant to convey to the plaintiff a given piece of real property. See *Stephenson v Golden*, 279 Mich 710, 735; 276 NW 849 (1937)(“Where one takes title to real estate upon a mere verbal promise to

reconvey to another, no constructive or resulting trust arises in favor of the promisee.”); *Longe v Kinney*, 171 Mich 312, 318-319; 137 NW 119 (1912); Dobbs, *supra* at § 4.3(2), p 400.

However, when the defendant is guilty of some wrongdoing, or where the circumstances would render it unconscionable for the defendant to retain legal title, courts can impose a constructive trust in favor of the plaintiff in order to remedy the injustice. *Arndt, supra* at 487. As the Michigan Supreme Court observed in *Racho v Beach*, 254 Mich 600, 606-607; 236 NW 875 (1931):

[W]hen it is shown that title has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one’s weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property, . . . equity will impress a constructive trust on the property and turn it over to the one to whom it rightfully belongs.

Therefore, in the context of a dispute over real property, a constructive trust serves as an equitable remedy imposed to rectify an injustice, not a recognition and enforcement of any alleged oral agreement establishing a trust. *Stephenson, supra* at 742; *Arndt, supra* at 487; Dobbs, *supra* at § 4.3(2), p 400. Thus, a constructive trust should not be seen as arising out of such an oral agreement, but out of the desire of a court of equity to prevent unjust enrichment. Dobbs, *supra* at § 4.3(2), p 393. Such a remedy is not barred by an application of the statute of frauds. *Stephenson* at 749; *Racho, supra* at 606-607. Justice demands that the requirement that such transfers of property be in writing not be used to shield a defendant from the consequences of the defendant’s wrongdoing. *Stephenson, supra* at 748. As the Michigan Supreme Court observed long ago:

It is the settled doctrine of the court that where a conveyance is obtained for ends which it regards as fraudulent or under circumstances it considers as fraudulent or oppressive by instant or immediate consequence, the party deriving title under it will be converted into a trustee, in case that construction is needful for the purpose of administering adequate relief; and the setting up the statute against frauds by the party guilty of the fraud or misconduct in order to bar the court from effective interference with his wrong-doing, will not hinder it from forcing on his conscience this character as a means to baffle his injustice or its effects.[*Huxley v Rice*, 40 Mich 73, 82 (1879).]

Indeed, when the defendant has obtained the property through fraud, either express or implied, the goals and purposes of the statute of frauds and the constructive trust are complementary.

Plaintiff has not filed a brief on appeal with this Court, but before the circuit court she argued that she should be granted summary disposition because defendant’s counter-claim was barred by the statute of frauds. As our forgoing discussion establishes, this argument is without merit unless plaintiff can establish that, under the circumstances, reasonable minds could not conclude that equity demands that a constructive trust be imposed to prevent unjust enrichment. See *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 641-642; 504 NW2d 635 (1993). Although plaintiff’s summary disposition motion was premised on the statute of frauds, she did assert in an affidavit accompanying that motion that she had been making the mortgage payments on the property.

In support of this assertion, plaintiff included copies of eight personal checks that she averred were mortgage payments. Each check was paid to the order of the mortgage corporation and signed “Gloria Rogers.” The earliest check is dated September 13, 1996.

After viewing this evidence in a light most favorable to defendant, we conclude that plaintiff failed to meet her burden of establishing that no dispute exists on the material issue of who had been paying the mortgage payments. Assuming that plaintiff’s representation of these checks as mortgage payments is accurate, the checks do not establish that she had been making the mortgage payments since she obtained her legal title to the property. Rather, the checks only establish that plaintiff had been making these payments since roughly the time she initiated her suit for nonpayment of rent. If defendant could establish at trial that he made the previous payments, then we believe reasonable minds could conclude that plaintiff was unjustly enriched.

Even if plaintiff had met her burden, we nonetheless would conclude that summary disposition was improper. Defendant averred in his affidavit in support of his motion to remove his counter-claim,¹ that he paid the closing costs and down payment, as well as “all of the mortgage payments including taxes and insurance.” Viewed in a light most favorable to defendant, we believe that reasonable minds could conclude under these circumstances that a constructive trust is required. See *Kammer, supra* at 642.²

Defendant next argues that the trial court erred in failing to hear his motion to compel and that plaintiff should be ordered to produce the information and documents requested. The trial court did not address this discovery matter because it reasoned that it could dispose of the issue through its decision on plaintiff’s motion for summary disposition. That grant of summary disposition having been set aside, the motion to compel again comes to the fore. We conclude that this matter is best resolved by the trial court upon remand.

Finally, defendant argues that the trial court erred in sua sponte adjourning mediation until it decided the motion for summary disposition. However, defendant failed to object to the adjournment of mediation. Issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599

¹ Defendant’s affidavit was also attached to his response to plaintiff’s motion for summary disposition.

² The trial court’s grant of summary disposition to plaintiff was premised, in large part, on the fact that defendant did not provide canceled checks, receipts, or other documentary evidence that he had made the mortgage payments. The trial court observed that it “could see no reason why Defendant has not been able to produce the canceled checks and the like.”

Initially, we note that defendant’s burden to establish that a genuine issue of material fact exists does not arise until and unless plaintiff satisfied her burden to establish the absence of a material factual dispute. We have concluded that plaintiff did not meet this burden. Further, assuming that plaintiff had satisfied her burden of proof, we believe defendant’s failure to provide the identified pieces of evidence speaks to defendant’s credibility, not whether a genuine issue of material fact existed.

NW2d 489 (1999). Finding no compelling or extraordinary circumstances in the case at hand, we decline to address this unpreserved issue.

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

/s/ Michael J. Kelly

/s/ Donald E. Holbrook, Jr.

/s/ Richard Allen Griffin