

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD R. GREEN,

Plaintiff-Appellant,

v

CEBER J. PERKINS,

Defendant-Appellee.

UNPUBLISHED

October 26, 2004

No. 248406

Genesee Circuit Court

LC No. 02-074320-CH

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties executed a contract for purchase, by land contract, of a parcel in Flint. One of the terms of the purchase agreement provided that if plaintiff objected in writing that the title was not marketable, defendant would "have thirty (30) days from the date notified in writing of the particular defects claimed, either (1) to remedy the title, or (2) If unable to remedy the title to refund the deposit in full termination of this agreement."

In a letter dated July 2, 2002, plaintiff's attorney wrote to defendant to report a break in the chain of title, advising defendant that to cure the defect it would be necessary either to find and record the deed through which the parcel had been conveyed to defendant's father forty years earlier, or to prevail in an action to quiet title. Plaintiff's attorney proposed continuing with the sale, with an extended closing date, and with some of the purchase money being withheld until the defect was cured. Defendant decided not to sell, and offered to refund plaintiff's earnest money.

Plaintiff sought specific performance of the purchase agreement. On cross-motions for summary disposition, the trial court granted defendant's motion for summary disposition and dismissed the complaint.

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Contract interpretation is likewise a question of law, calling for review de novo. *Archambo v Lawyers Title Ins Corp*, 466 Mich 402, 408; 646 NW2d 170 (2002). A court's decision whether

to order the equitable remedy of specific performance is reviewed for an abuse of discretion. See *Bartos v Czerwinski*, 323 Mich 87, 93; 34 NW2d 566 (1948).

Plaintiff relies on *Ogooshevitz v Arnold*, 197 Mich 203, 211; 163 NW 946 (1917), where our Supreme Court held that specific performance of a contract for the sale of real property “may be decreed” where “[i]t was within the power of the defendants to remove this doubt, to perform their contract, to make clear the record title” However, plaintiff does not dispute that the only ways to remove the cloud on title in this case were to locate and record the forty-year-old deed, or to prevail in an action to quiet title. The trial court did not rule that the original deed could not be found,¹ but instead observed that no evidence had been presented to suggest that it might be found. We also note that plaintiff’s proposal for continuing with the sale pending the removal of the cloud on title did not envision that the deed would be found. Plaintiff’s speculation on appeal that it should be easy to find that deed poorly rebuts the trial court’s reasoned observation to the contrary.

Concerning an action to quiet title, the trial court and the parties agreed that no such action could be completed in the thirty days specified in the contract for clearing title. Moreover, any such action would involve both risk and expense.

In *Bartos, supra* at 92-93, our Supreme Court held that where title is not marketable “because of a possible outstanding interest in the property in another, the remedy of specific performance must . . . be denied.” The Court continued that a court may not compel a seller “to obtain a proper conveyance or release” from the potentially interested party, or to “institute and carry through to a successful termination proceedings to quiet title to the property.” *Id.* at 93.

As the trial court observed, plaintiff was free to decline to exercise his right to notify defendant of the title defect, and, thus, to take title and with it the risk of a defect. Although it was up to plaintiff to trigger, or not, that provision in the first instance, having done so, it became defendant’s prerogative to go to the trouble and expense to cure the title defect in thirty days or else to return plaintiff’s money and terminate the agreement. Defendant was not obliged to accept plaintiff’s offer to go ahead with the sale under modified contract terms.

Plaintiff asserts, without specific citation, that “the trial court concluded that the ability to cure a title defect within 30 days was a condition precedent to his duty to perform.”² In fact, we find the expression “condition precedent” neither in the transcript of the motion hearing nor in the order appealed from. In any event, it is an imperfect characterization for these circumstances.

¹ In deciding motions for summary disposition, “[t]he court may not make factual findings or weigh credibility.” *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993), appeal dismissed by stipulation 521 NW2d 610 (1994).

² A “condition precedent” is a condition “that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been arrested on, before the contract shall be binding on the parties.” Black’s Law Dictionary (6th ed, 1990), p 293.

The contract language in question stemmed from the seller's covenant of title, the buyer's right to insist on marketable title, and the rights of either should there be a problem. Defendant's performance was not excused because of the defect in title. Instead, having been notified of a title problem, according to the procedure specified by the contract, defendant, as one who could not cure the defect in thirty days, was in fact performing under the contract by offering to return plaintiff's deposit and terminate the agreement. Whether defendant was in fact pleased to be relieved of the obligation to sell the property is beside the point.

For the above reasons, the trial court properly granted defendant's motion for summary disposition.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra