STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL KELLY,

Plaintiff/Third-Party Defendant-Appellant,

and

CATHERINE KELLY,

Plaintiff-Appellant,

v

RAY MCCULLOUGH and MARY MCCULLOUGH,

Defendants-Appellees,

and

ELIZABETH BUTLER, f/k/a ELIZABETH MCCULLOUGH and DAVID BUTLER,

Third-Party Plaintiffs-Appellees.

UNPUBLISHED
July 24, 2008

No. 278904
Clinton Circuit Court
LC No. 06-010013-CK

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting appellees summary disposition pursuant to MCR 2.116(C)(10) and quieting title in the disputed property in favor of Elizabeth and David Butler. We affirm in part, reverse in part, and remand for further proceedings.

This action arises from an agreement to purchase property that was signed by plaintiff Michael Kelly ("Kelly"), as buyer, and defendant Ray McCullough ("McCullough"), as seller, but not by their wives. After the McCulloughs accepted payments from Kelly while he attempted to arrange for financing, the McCulloughs sold the property to their daughter Elizabeth and her future husband, David Butler. Plaintiffs sued the McCulloughs for breach of contract

and specific performance. The Butlers filed a separate action against Kelly for trespass and to quiet title. The actions were consolidated by the trial court.

The purchase agreement at issue is dated October 24, 2005, and is for 50 acres of a 60-acre parcel. The agreement identifies "Ray and Mary McCullough" as "Seller" and Michael Kelly, as "Buyer." The agreement required Buyer to make a "deposit" of $500 on the first of the month that was to be credited against the total price. The printed agreement states, "BUYER FURTHER AGREES THAT FINANCING WILL BE SECURED WITHIN 90 DAYS FROM THE DATE OF THIS AGREEMENT," but the last three words are scratched out and the words "WE AGREE UPON" are handwritten in the area. The change is not initialed. Ray McCullough denied agreeing to this change. The agreement is dated November 21, 2005, as signed by Kelly, and December 17, 2005, as signed by McCullough.

Kelly made payments that were due under the agreement. Elizabeth Butler ("Butler") arranged for a survey to delineate the 50 acres being sold. In March 2006, Kelly advised Butler that he was experiencing difficulty in obtaining financing and inquired whether her parents would lower the price. She told him that they would not. According to Kelly, he then obtained loan approval by refinancing his house, but when he informed Butler, she said that her parents were not going to continue with the purchase agreement and that she and David Butler had "decided to keep it." According to Butler, after Kelly was unable to obtain financing for the full purchase price, she told him that "we" were going to obtain financing elsewhere. Her parents intended to refinance the property to lower their payments. In April 2006, Elizabeth Butler offered to purchase the property. Ultimately, the McCulloughs sold all 60 acres to her and David Butler for the amount owed on the land, the closing costs, "and all those things."

The Butlers and the McCulloughs moved for summary disposition pursuant to MCR 2.116(C)(8), (9), and (10), raising several different grounds. The trial court concluded that the absence of Mary McCullough's signature on the purchase agreement was fatal to plaintiffs' claims and, therefore, granted the Butlers' and the McCulloughs' motions, stating:

> The absence of Mary's signature on the purchase agreement is fatal to the Plaintiff's [sic] claim factually. A tenancy by the entireties is a new legal person, is a matter of legal fiction; that is to say, the husband and wife become a separate legal entity, and that legal entity can only convey title or oblige itself to convey title in a purchase agreement if both husband and wife sign the document conveying or agreeing to convey an interest in the real estate. It's not a statute of frauds problem of the absence of a writing; that's why, for example, part performance or equitable defenses don't make up for the absence of Mary's signature here. Indeed, this is a case, as Mr. Doyle [plaintiffs' counsel] argues of he said/she said. He, Ray, said he would sell the property; she, Mary, didn't say she would, and without Mary's obligation, that tenancy by the entireties that had title and was receiving title and that owned the property couldn't be obliged to convey it.
>
> This is one of those cases that makes a sort of argument for the assistance of counsel, and I don't fault the parties for not having that, but it's important that they understand that their rights and obligations can be affected, and here, without Mary's signature, the present motion must be granted.

> As to the failure to secure financing within the agreed period, for the record, for any subsequent use, the Court agrees with Mr. Doyle. Giving his client the benefit of the doubt, there is a legitimate question of fact as to whether or not that provision was modified or complied with, but I think that the absence of Mary's signature is fatal.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

Initially, plaintiffs' reliance on the April 6, 2006, deed to argue that the McCulloughs did not own the property as tenants in the entirety is misguided. That deed is for a ten-acre parcel that was not part of the land that was the subject of the October 2005 purchase agreement.

However, the trial court erred in granting summary disposition on the basis that Mary McCullough did not sign the purchase agreement, given that there is no dispute that she agreed to sell the property. "It is true that neither the wife not the husband alone can contract effectually to sell property owned by them as tenants by the entireties." *Vande Berg v Vanden Bosch*, 242 Mich 37, 39; 217 NW 37 (1928); *Way v Root*, 174 Mich 418; 140 NW 577 (1913); *Williams v DeMan*, 7 Mich App 71, 74; 151 NW2d 247 (1967). But if a purchase agreement is signed by one spouse and the other has orally agreed to the sale, the absence of the latter's signature is not necessarily fatal to a claim for specific performance. In *Vande Berg, supra*, pp 39-40, our Supreme Court stated:

> It is true that neither the wife nor the husband alone can contract effectually to sell property owned by them as tenants by the entireties. [*Way, supra*]. But it is contended and proved here that both defendants, husband and wife, agreed to exchange—made the contract to exchange—one in writing, the other orally, and, as we have seen, the oral contract, in the circumstances, is removed from the operation of the statute of frauds, and therefore the contract or agreement with respect to both defendants is valid and existing. In principle and in this regard the case would not be different if the defendant wife had indorsed her assent in writing on the agreement signed by the remaining parties.

Thus, in this case, the absence of Mary McCullough's signature is not dispositive of the enforceability of the purchase agreement if her assent to the agreement is established in a manner consistent with the statute of frauds. Although appellees advocated in their motion for summary disposition that the agreement was not enforceable, the undisputed evidence was that Mary McCullough had agreed to the sale. Her endorsement of the checks submitted by Kelly as payments on the contract is evidence of her assent to the contract.

Moreover, the absence of Mary McCullough's signature is not dispositive of the breach of contract claim against McCullough. Like the present case, *Joyce v Vemulapalli*, 193 Mich App 225; 483 NW2d 445 (1992), concerned a purchase agreement signed by the defendant husband, but not his wife, for the sale of property. Disagreements arose at the closing and the plaintiffs sued for breach of contract and sought specific performance. This Court held that whether the wife's interest was as a tenant in the entireties or a dower interest, the conveyance

was "void for purposes of specific performance." *Id*., p 228. However, the Court separately considered whether damages could be awarded for breach of contract. The Court drew a distinction between similar cases in which "the signature was a condition precedent pursuant to the terms of the agreement," where restitution of deposit money was ordered, *id.*, p 229, and those in which "the husband had expressly or impliedly promised to convey marketable title," and in which damages for breach of contract were available, *id*., p 230. The Court concluded that the case fell into the latter group, stating, "The lack of the wife's signature does not prohibit the plaintiffs from bringing an action for damages against the husband based on his failure to secure a properly executed purchase agreement." *Id*., p 230.

In the present case, McCullough signed a purchase agreement in which he represented and warranted that he had "full power and authority to bind Seller" and that "Seller has the full right and authority to enter into this Agreement, to consummate the sale, transfer and assignments contemplated herein . . . ." It is unnecessary to resolve at this juncture whether Mary McCullough's signature was a condition precedent to the formation of the contract or whether McCullough expressly or impliedly promised to convey marketable title, because the parties do not brief this distinction. However, we conclude that the absence of Mary McCullough's signature was not a basis for granting summary disposition of plaintiffs' breach of contract claim.

We have reviewed the other arguments advanced by appellees as alternative grounds for affirmance and find one to be meritorious.

Inasmuch as plaintiff Catherine Kelly was not a party to the purchase agreement, dismissal of her claims for breach of contract and specific performance was appropriate pursuant to MCR 2.116(C)(8). Plaintiffs state that she was included in this lawsuit "for the sole reason that she is married to the Appellant, Michael Kelly." They offer no legal authority showing that her marital relationship to Kelly affords her legal rights under the contract.

We agree with the trial court that questions of fact remain concerning whether the 90-day time period for obtaining financing, which was printed in the agreement and stricken out by hand, was part of the agreement. Conflicting evidence was presented concerning this provision.

Contrary to appellees' argument, the McCulloughs' conveyance of the property to the Butlers is not a basis for dismissal of plaintiffs' claim for specific performance. There is support for the view that the Butlers, as the subsequent grantees of the McCulloughs, as well as the McCulloughs themselves, are necessary parties to an action for specific performance. "Persons who acquire interests from the seller in the lands contracted to be sold, after the contract of sale, are necessary parties to an action for specific performance of the contract for sale. In an action against subsequent grantees of the seller, the seller is a necessary party although he or she has parted with the legal title, unless the buyer has accepted an assignee." 11A Callaghan's Michigan Pleading and Practice (2d ed), § 86.57, p 248. However, the court rule pertaining to the joinder of necessary parties does not prescribe dismissal as the appropriate course of action for nonjoinder of necessary parties. See MCR 2.205(B). "The defect could presumably have been cured by amending the pleadings and joining the necessary parties." *Skiera v National Indem Co*, 165 Mich App 184, 188-189; 418 NW2d 424 (1987).

Although appellees also argue that dismissal of plaintiffs' breach of contract claim is warranted because they did not suffer any damages, the measure of damages is generally the difference between the agreed price and the value at the time of the breach. *Stanton v Dachille,* 186 Mich App 247, 252; 463 NW2d 479 (1990); *Soloman v Western Hills Dev Co,* 110 Mich App 257, 266-267; 312 NW2d 428 (1981). The proponents of a motion for summary disposition have the initial burden of presenting evidence that there is no disputed factual issue regarding the absence of damages. MCR 2.116(G)(3); *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). Here, appellees did not present any evidence concerning the value of the property to establish the absence of damages.

In sum, we affirm the trial court's dismissal of plaintiff Catherine Kelly's claims, but reverse in all other respects.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello