

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MELISSA KINDE and ROBERT KINDE,

Plaintiffs-Appellees,

v

THOMAS GRZYWACZ,

Defendant-Appellant.

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UNPUBLISHED

February 5, 2009

No. 281771

Wayne Circuit Court

LC No. 06-615374-CK

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from a circuit court order granting his motion for summary disposition and denying his request for sanctions on the ground that plaintiffs' action was frivolous under MCL 600.2591(1).<sup>1</sup> We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Factual and Procedural History

Plaintiff Melissa Kinde and defendant never married, but jointly purchased a home and entered into a mortgage. When the relationship between Melissa and defendant deteriorated, Melissa moved out of the residence. The parties agree that Melissa's father, plaintiff Robert Kinde, provided \$10,000 to assist with the home's purchase, but differ regarding whether this money constituted a gift or a loan. Defendant contends the \$10,000 was a gift given without any obligation for repayment. Plaintiffs argue that defendant and Melissa orally agreed to repay Robert.

Plaintiffs filed a three-count complaint stating claims for breach of contract, eviction, and equitable relief. Regarding the breach of contract claim, plaintiffs asserted that defendant's failure to repay the \$10,000 and his refusal to pay rent to Melissa, constituted a breach of contract "and/or lease obligation . . ." Plaintiffs' further alleged that defendant's refusal to list the property for sale constituted "a breach of a joint venture" between Melissa and defendant. In support of their eviction claim, plaintiffs averred that Melissa had demanded rental payments

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<sup>1</sup> Plaintiffs have not cross-appealed the circuit court's order granting summary disposition.

because defendant retained “complete control” and “enjoyment” of the property, and that defendant’s refusal to pay rent constituted a breach of his month-to-month tenancy. The equitable relief count asserted that Melissa and defendant had “entered into a contract by way of a joint venture” to acquire both a residence and an investment property. Plaintiffs sought an order compelling defendant to refinance the property, setting-off his allegedly overdue rent payments against his equitable property interest.

Following a settlement conference, the circuit court ordered defendant to refinance the mortgage, and that Melissa cooperate in the refinancing process. The order instructed, “excess proceeds generated as the result of said refinancing, if any, are to be placed in escrow pending further disposition by the Court.” Defendant subsequently sought summary disposition pursuant to MCR 2.116(C)(10), as well as sanctions pursuant to MCL 600.2591. Defendant’s sanction request averred that plaintiffs lacked a reasonable basis to believe that the facts alleged in their complaint were true, and further asserted that plaintiffs’ legal positions were “devoid of arguable legal merit.”

The circuit court granted summary disposition in favor of defendant, but denied an award of sanctions. Although the circuit court did not elaborate regarding its reasoning regarding sanctions, it stated that the initial existence of the mortgage in both parties’ names “would have been a basis to file some sort of action to either clear up who owned it or who was gonna live there.”

## II. Standard of Review

This Court reviews for clear error the circuit court’s findings in regard to whether a claim is frivolous. *Schroeder v Terra Energy, Ltd*, 223 Mich App 176, 195; 565 NW2d 887 (1997).

## III. Analysis

An action is frivolous under MCL 600.2591(1) when the party’s primary purpose in initiating the action was to harass, embarrass, or injure the prevailing party, or the party had no reasonable basis to believe that the facts underlying that party’s legal position were in fact true, or the party’s legal position was devoid of arguable legal merit. MCL 600.2591(3)(a)(i) – (iii). On appeal, defendant addresses only the later two elements.

### A. Breach of Contract

In support of his motion for summary disposition regarding plaintiff’s breach of contract claim, defendant submitted a “gift letter” executed by the parties and supplied to the mortgage lender. The letter provided, “We state that no repayment of this gift is expected.” Defendant asserted that (1) this letter belied plaintiffs’ attempt to characterize the \$10,000 as a loan, (2) no written contract existed requiring repayment, and (3) an oral contract to repay cannot be implied where an express contract, such as the gift letter, governs the same subject matter. According to defendant, plaintiffs’ breach of contract claim qualified as frivolous because plaintiffs knew that the funds were intended as a gift. In response, plaintiffs submitted Melissa’s affidavit stating that although the parties “agreed that the gift note was called a gift note for the purposes of the loan,” defendant promised to repay the money to Robert.

We conclude that Melissa's affidavit factually supported that the money was a loan that defendant agreed to repay, despite the content of the "gift letter." In Michigan, oral contracts are enforceable. See, generally, *Rood v General Dynamics Corp*, 444 Mich 107, 118-119; 507 NW2d 591 (1993). Therefore, a factual basis existed for plaintiff's breach of contract claim, and the claim was not "devoid of legal merit." Defendant correctly contends that a contract may not be implied where an express contract covering the same subject matter is in force. However, the "gift letter" was not a contract, and plaintiffs did not claim that a contract should be *implied*, but rather that an oral contract existed.

With respect to the claim regarding defendant's failure to pay rent, defendant contended in the circuit court that because defendant and Melissa were tenants in common, no obligation existed for defendant to pay rent absent a written agreement. Defendant asserted that the oral agreement alleged by plaintiff would violate long-standing Michigan jurisprudence. Plaintiffs responded by pointing out that after Melissa left the residence, she and defendant orally agreed that he would continue to live there and would pay the mortgage, taxes and rent. Plaintiffs again supported their factual assertions with Melissa's affidavit.

Melissa's affidavit factually supports that defendant orally agreed to pay rent. Defendant produced no evidence disputing this assertion, much less demonstrating that the plaintiffs lacked a reasonable basis to believe that the facts underlying their legal position were true. MCL 600.2591(3)(ii). Consequently, plaintiffs' legal position arguably possessed some merit. A cotenant may not recover rent from the other cotenant for use of the premises "in the absence of an express agreement to pay it." *Tomchak v Handricks*, 370 Mich 143, 145; 121 NW2d 409 (1963); *DesRoches v McCrary*, 315 Mich 611, 615; 24 NW2d 511 (1946). Although defendant maintained that the agreement must be in writing, the case law he cited does not contain this limitation.

Defendant next challenged plaintiff's joint venture claim, contending that in the absence of a written agreement, Michigan law does not recognize an oral joint venture with respect to interests in land. Plaintiffs responded that equity should prevail over the statute of frauds, and that they did enter into a "joint purchase" as evidenced by the title. According to Melissa's affidavit, she and defendant agreed to enter a joint business venture to purchase a residence and a business investment.

We again find that Melissa's unrefuted affidavit factually supported her claim. Defendant's contention that a joint venture must be in writing is incorrect. The requirements for a joint venture set forth in *Kay Investment Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 437; 731 NW2d 777 (2006), do not refer to the need for a *written* agreement. More importantly, one of the cases cited by defendant, *Summers v Hoffman*, 341 Mich 686, 697-698; 69 NW2d 198 (1955), contradicts his position that a written agreement is necessary.

## B. Eviction

Defendant next contends that actions for eviction are within the "sole jurisdictional province" of district courts, and reiterates that no written, oral, or implied agreement obligated defendant to pay rent. Plaintiffs counter that defendant's failure to pay rent forced Melissa to seek eviction, but "the subject issue becomes moot after Defendant refinanced exclusively in his name. Plaintiff's right to rent damages up to the refinance is still meritorious."

Regardless of whether an oral agreement existed regarding rent payments, plaintiffs fail to identify any legal authority supporting that a cotenant may evict another cotenant for failure to pay rent. However, based on our review of the entire record, we conclude the circuit court's failure to award sanctions on this ground does not constitute clear error.

### C. Equitable Relief

Finally, defendant argued in the circuit court that plaintiffs' complaint failed to allege a cognizable claim for equitable relief, and merely reiterated allegations from the breach of contract and eviction claims. Plaintiffs asserted that Melissa was entitled to her share of equity in the property. According to Melissa's affidavit, at the time the court ordered defendant to refinance, the outstanding mortgage balance was \$140,000, and the property appraised at \$150,000. Plaintiffs alleged that defendant "absorbed the approximate equity of \$10,000 Dollars into his refinance. Essentially, there was no money left to be placed in escrow as the Defendant decided to structure his mortgage in a fashion so that it was impossible to procure any equity out of the home." According to plaintiffs, the equitable relief claim actually "amounts to a request for a partition and forced sale." Defendant counters that plaintiffs never sought partition and did not have any intention to do so, because they knew or should have known that there was no equity in the property.

Although plaintiffs did not specifically refer to "partition" in the circuit court, their allegations supported that partition may have supplied an appropriate legal theory to terminate the cotenancy. "The object of partition is to enable joint tenants or tenants in common to end their cotenancy and obtain possession of separate sole estates in specific property, free of any hindrance from other owners. When this cannot be accomplished, the property should be sold and the proceeds divided." 2 Cameron, Michigan Real Property Law (3d ed), § 30.19, p 1792. MCL 600.3304 provides, "All persons holding lands as joint tenants or as tenants in common may have those lands partitioned." Although defendant claims that plaintiffs did not seek partition because there was no equity in the premises, Melissa's affidavit contradicts this assertion. Thus, an equitable theory existed pursuant to which Melissa may have been able to obtain relief, despite plaintiffs' failure to properly label it. "[T]he gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). In assessing whether the action was devoid of legal merit for the purposes of awarding sanctions, this Court may consider the gravamen of the action, rather than relying only on the labels that were used. Consequently, we find that a claim seeking to terminate a cotenancy is not "devoid of legal merit."

After reviewing plaintiffs' complaint and the evidence submitted we are not persuaded that the circuit court clearly erred in finding that plaintiffs' action was not frivolous. *Schroeder, supra* at 195.

Affirmed.

/s/ Michael J. Talbot  
/s/ Richard A. Bandstra  
/s/ Elizabeth L. Gleicher