STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of MARJORIE HELEN WILLIAMS, Deceased.

RONALD WICKHAM,

Petitioner-Appellee,

v

SUSAN M. JOINES, Personal Representative of the Estate of MARJORIE HELEN WILLIAMS,

Respondent,

and

DAVID NIXON and BLUE STAR HARBOR, INC.,

Respondents-Appellants.

UNPUBLISHED
June 9, 2009

No. 281118
Van Buren Probate Court
LC No. 01-000038-DE

RONALD WICKHAM,

Plaintiff/Counter-Defendant-Appellee,

v

SUSAN M. JOINES, Personal Representative of the Estate of MARJORIE HELEN WILLIAMS,

Defendant,

and

DAVID NIXON and BLUE STAR HARBOR, INC.,

No. 281119
Van Buren Probate Court
LC No. 2006-000004-CZ

Defendants/Counter-Plaintiffs-
Appellants.

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

At issue in these consolidated cases is whether petitioner/plaintiff Ronald Wickham or respondent/defendant Blue Star Harbor, Inc. ("Blue Star"), have the superior right to purchase real property belonging to the estate of the decedent, Marjorie Williams. The probate court resolved the dispute by granting summary disposition in favor of Wickham, who the court determined was entitled to purchase the property pursuant to his prior exercise of an option in a lease agreement, and the court voided a later land contract between Blue Star and Susan M. Joines, as personal representative of the decedent's estate. The probate court also removed Joines as personal representative of the decedent's estate and ordered that she be held personally liable for attorney fees and costs. Blue Star and its president, respondent/defendant David Nixon (collectively referred to as "appellants"), now appeal as of right. We affirm.

I

We first consider Wickham's argument that appellants lack standing to pursue this appeal. The issue of standing, being jurisdictional in nature, may be raised at any time. *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 371-372; 716 NW2d 561 (2006). To have standing to seek appellate relief, a party must be an "aggrieved party." MCR 7.203(A); *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006). The party must suffer a "concrete and particularized injury" arising from the actions of the lower court. *Id.* at 291-292.

We agree with Wickham that appellants lack standing to challenge the probate court's decisions to remove Joines as personal representative of the decedent's estate and to hold Joines personally liable for attorney fees. Appellants have not demonstrated any "concrete and particularized injury" to them arising from these decisions. Thus, appellants lack standing to raise these issues and we decline to consider them.

However, we disagree with Wickham's argument that appellants, or at least Blue Star, lack standing to challenge the probate court's decision to allow Wickham to complete the purchase of the property. The probate court's decision affects Blue Star's competing claim of an interest in the disputed property under its land contract with Joines. A land contract vendee acquires equitable title to property. *Graves v American Acceptance Mortgage Corp*, 469 Mich 608, 616; 677 NW2d 829 (2004); *Ligon v Detroit*, 276 Mich App 120, 125; 739 NW2d 900 (2007). Therefore, Blue Star is aggrieved by the probate court's decision and, therefore, has standing to challenge that decision on appeal.

II

Appellants argue that the probate court erred in granting summary disposition to Wickham. We disagree. We shall consider the probate court's decision within the framework of

the statutory scheme and court rules applicable to disputes concerning property in a decedent's estate. The Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, became effective April 1, 2000, approximately one month after Joines first petitioned the probate court to commence independent administration of the decedent's estate. MCL 700.8101(1). The EPIC was in effect when Wickham claimed to have exercised the lease agreement option in August 2000 and first petitioned the probate court in June 2006 to consider his claim that he had the superior right to purchase the property. See MCL 700.8101(2)(b) (subject to certain exceptions, the EPIC applies to "a proceeding in court pending on [its effective date] or commenced after that date regardless of the time of the decedent's death . . . .").

Under the EPIC, a probate court has "exclusive legal and equitable jurisdiction" over "[a] matter that relates to the settlement of a deceased individual's estate," including a proceeding involving a "[d]eclaration of rights that involve an estate, devisee, heir, or fiduciary." MCL 700.1302(a)(*iii*). A probate court has "concurrent legal and equitable jurisdiction" with regard to a decedent's estate, to "[d]etermine a property right or interest" and "[h]ear and decide a contract proceeding or action by or against an estate . . . ." MCL 700.1303(1)(a), (i). Under MCR 5.001(A), "[p]rocedure in probate court is governed by the rules applicable to other civil proceedings, except as modified by the rules [in chapter five]." See also *In re Nestorovski Estate*, ___ Mich App ___; ___ NW2d ___ (Docket No. 271704; decided March 31, 2009), slip op, p 7. We review de novo a probate court's summary disposition ruling under MCR 2.116. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). An issue concerning the proper interpretation of a contract is also an issue of law subject to de novo review. *Id.* at 24.

In this case, although the probate court stated that it was granting Wickham's motion under both MCR 2.116(C)(9) and (10), a motion under subrule (9) tests the legal sufficiency of a defense on the pleadings alone. MCR 2.116(G)(5); *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 47; 457 NW2d 637 (1990). Because the parties relied on documentary evidence beyond the pleadings, and the probate court's decision indicates that it considered the parties' documentary evidence, we review the probate court's decision under MCR 2.116(C)(10). *Healing Place at North Oakland Medical Ctr v Allstate Ins Co*, 277 Mich App 51, 55; 744 NW2d 174 (2007) (hereinafter, "*Healing Place*"); see also *Spiek v Dep't of Transportation*, 456 Mich 331, 338; 572 NW2d 201 (1998). We will not disturb the probate court's decision if the correct result was reached, even if we do not entirely agree with its reasoning. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000); *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 643; 591 NW2d 393 (1998).

A motion under MCR 2.116(C)(10) tests the factual support for a claim and "should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Healing Place*, *supra* at 55-56. "[A] court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence" submitted by the parties to the extent that they would be admissible as evidence, and consider the evidence in a light most favorable to the nonmoving party. *Id.* at 56; see also MCR 2.116(G)(6). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Where a claim involves the interpretation of a contract, summary disposition is inappropriate under MCR 2.116(C)(10) if the contract language is ambiguous and factual development is necessary to determine the parties'

intent. *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 363; 480 NW2d 275 (1991). Contract language "is ambiguous when two provisions 'irreconcilably conflict with each other'" or are "'equally susceptible to more than a single meaning.'" *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007), quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003), and *Mayor of Lansing v Michigan Pub Service Comm*, 470 Mich 154, 166; 680 NW2d (2004).

Examined within this framework, appellants have not shown any basis for disturbing the probate court's decision. They have not shown that a genuine issue of material facts exists with respect to Wickham's superior right to purchase the disputed property.

A.

Initially, the probate court determined that Blue Star was not a good-faith purchaser entitled to the protection of MCL 565.29 of the real property recording act. Appellants do not address this aspect of the probate court's decision and, accordingly, we will assume for purposes of review that Blue Star was not a good-faith purchaser. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *In re JS & SM*, 231 Mich App 92, 98-99; 585 NW2d 326 (1998), overruled on other grounds by *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000) (Stating that "failure to brief the merits of an allegation of error is deemed an abandonment of an issue"). Instead, whether Wickham had a superior right to purchase the disputed property depends on whether he complied with the terms of the option provision in his lease agreement with the decedent. "An option is basically an agreement by which the owner of property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *In re Egbert R Smith Trust, supra* at 25, quoting *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). Stated otherwise, it constitutes an "enforceable promise not to revoke an offer for a specified time." *In re Egbert R Smith Trust, supra* at 26.

> As a general rule, an option contract is strictly construed and the time for performance is of the essence. *Brauer v Hobbs*, 151 Mich App 769, 777; 391 NW2d 482 (1986); *Bennett v Eisen*, 64 Mich App 241, 246; 235 NW2d 749 (1975); 77 Am Jur 2d, Vendor and Purchaser, § 42, p 223. An option is a mere offer that may ripen into a binding bilateral contract upon a seasonable acceptance of the terms recited therein. *Le Baron Homes, Inc v Pontiac Housing Fund, Inc*, 319 Mich 310, 315; 29 NW2d 704 (1947). Acceptance of the option must be in agreement with the terms proposed and the exact thing offered. *Id.* Similarly, the option must be exercised in strict compliance with the time limitations established by the option agreement. *Id.*
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> In addition to demonstrating a valid, enforceable contract, the party requesting specific performance must show that he fulfilled the terms of the contract by performing or offering to perform, or that he is ready, willing, and able to perform the contract in its entirety. *Derosia v Austin*, 115 Mich App 647, 652; 321 NW2d 760 (1982); 71 Am Jur 2d, Specific Performance, § 60, p 88, and § 145, p 188. The decision to grant or deny specific performance lies within the discretion of the trial court. *Derosia*, *supra* at 652. In order to be entitled to the remedy of specific performance of an option contract, the option must be accepted unequivocally in order to convert the option into a binding contract for the sale of

> the subject property. 71 Am Jur 2d, p 188. A party's inability or refusal to perform the contract when the performance is due will be fatal to the party's specific performance claim. *Id.* [*Bowkus v Lange*, 196 Mich App 455, 460; 494 NW2d 461 (1992), rev'd on other grounds 441 Mich 930 (1993).]

In this case, the probate court erred to the extent that it found that Wickham was required to accept the option in writing. The option specified:

> A. That the Tenant may, should this lease not be in default, have the exclusive privilege of purchasing the said premises during the period between execution of this Lease with Option and September 19, 2000, for the sum of One Hundred Thousand Dollars ($100,000.00).
>
> B. At the time of the sale and payment of $100,000.00 the Landlord will provide the Tenant with a good and sufficient Warranty Deed, convey the said premises to Tenant on the conditions herein agreed upon. Landlord shall deliver with the Deed a fee simple title insurance policy guaranteeing title to the premises in the name of Tenant. Upon the exercise of the Tenant's exclusive privilege of purchasing said premises prior to the expiration of this Lease for the sum of $100,000.00, hereinafter referred to as the original purchase price, the Lessee shall be entitled to certain credits . . . .

Because the option clause does not require that acceptance of the option offer be in writing, and written acceptance was not required by the statute of frauds, MCL 566.108, it was not necessary that Wickham provide a written acceptance. *Pleger v Bouwman*, 61 Mich App 558, 560; 233 NW2d 82 (1975). We disagree with appellants' argument that Wickham's actual purchase of the property by September 19, 2000 was necessary to accept the offer. Because no particular form of acceptance was specified, acceptance could be inferred from Wickham's acts and words. *Hunt v State Hwy Comm'r*, 350 Mich 309, 318; 86 NW2d 345 (1957), overruled in part on other grounds in *Greenfield Constr Co, Inc v Dep't of State Hwys*, 402 Mich 172; 261 NW2d 718 (1978). An acceptance is sufficient "where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Powell Production, Inc v Jackhill Oil Co*, 250 Mich App 89, 96-97; 645 NW2d 697 (2002), quoting *Kraus v Gerrish Twp*, 205 Mich App 25, 45; 517 NW2d 756 (1994), aff'd in part and remanded on other grounds 451 Mich 420 (1996).

Therefore, while Wickham's tender of payment might have been a sufficient act to convert the offer into a binding bilateral purchase agreement for the sale of the property, it was not the only means that Wickham could use to manifest his acceptance of the offer. And while a written acceptance was not required, examined as a whole, the August 3, 2000, letter from Wickham's attorney to Joines's attorney unequivocally reflects Wickham's intent to be bound by the offer. The letter is qualified only in that it treats Joines as having an obligation under the option to provide ingress and egress to the property. Wickham's attorney wrote, "I would like to know how you propose that my client receive ingress and egress to his property and what will be done to provide that." Consistent therewith, the evidence before the probate court showed that Joines, with the assistance of counsel, took steps to perfect an easement for the property and filed papers with the probate court indicating that the decedent's estate remained open for the purpose

of obtaining the required easement to complete the sale. It was only after the easement was obtained and, according to Joines's deposition, after she decided that Wickham's proposed payoff amount to complete the sale was unacceptable, that she entered into the land contract with Blue Star.

Under the option, the decedent had an obligation to provide a "good and sufficient Warranty Deed" and "a fee simple title insurance policy guaranteeing title" for the property. "[U]nder MCL 565.151, a conveyance by warranty deed is deemed to include the usual covenants of title, including the covenant of seisin and of good right to convey, the covenant of quiet enjoyment, the covenant against encumbrances, and the covenant to warrant and defend the title." *McCausey v Ireland*, 253 Mich App 703, 707; 660 NW2d 337 (2002). The concept of marketable title is thus related to a warranty deed. See *Barnard v Brown*, 112 Mich 452, 454-455; 70 NW 1038 (1897) (holding that a contract providing for "a good and sufficient warranty deed" embraced marketable title).

> Marketable title is one of such character as should assure to the vendee the quiet and peaceful enjoyment of the property, which must be free from incumbrance. [*Brown, supra*]. An incumbrance is anything which constitutes a burden upon the title, such as a right-of-way, a condition which may work a forfeiture of the estate, a right to take off timber, or a right of dower. *Post v Campau*, 42 Mich 90; 3 NW 272 (1879). A title may be regarded as "unmarketable" where a reasonably prudent man, familiar with the facts, would refuse to accept title in the ordinary course of business, and it is not necessary that the title actually be bad in order to render it unmarketable. *Bartos v Czerwinski*, 323 Mich 87; 34 NW2d 566 (1948). See, also, *Cole v Cardoza*, 441 F2d 1337 (CA 6, 1971) (applying Michigan law). [*Madhavan v Sucher*, 105 Mich App 284, 287-288; 306 NW2d 481 (1981).]

The information in the August 3, 2000, letter regarding access to the property does not impinge on Wickham's expressed intent to be bound by legal consequences flowing from the offer. The information only had a bearing on the performance that Joines and her attorney were, in fact, undertaking to complete the transaction. Giving the benefit of all reasonable doubt to appellants, they failed to show a genuine issue of material fact with regard to whether Wickham provided the requisite acceptance through the letter. Therefore, while we do not entirely agree with the probate court's reasoning, we conclude that it reached the right result in granting summary disposition in favor of Wickham with respect to the issue of acceptance.[1]

B.

We also disagree with appellants' claim that Wickham's default status at the time of the August 3, 2000, letter precluded him from exercising the option. The probate court determined

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[1] We express no opinion regarding appellants' assertion in their brief that "marketable title" existed at all times. We deem this issue abandoned because it has not been briefed. *Prince*, *supra* at 197. We hold only that Wickham's acceptance of the offer was unequivocal.

that the condition requiring that the option could be exercised only if Wickham was not in default under the lease had been waived. Appellants have not adequately briefed the question of whether a contractual waiver occurred, with citation to supporting authority. Thus, we deem this issue abandoned. *Prince, supra* at 197.

C.

Appellants have similarly failed to sufficiently address the probate court's alternative determination that Joines is equitably estopped from denying that the offer to purchase was accepted. *Id.*; see also MCR 7.212(C)(7); *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004) (stating that this Court will not search for factual support for a party's claim). We note, however, that while appellants have not shown that they were denied an opportunity to be heard with respect to the doctrine of equitable estoppel, they could have moved for reconsideration under MCR 2.119(F) if they believed that the probate court misapplied the doctrine. Cf. *Boulton v Fenton Twp*, 272 Mich App 456, 463-464; 726 NW2d 733 (2006) (holding that a party's motion for reconsideration after the trial court sua sponte granted summary disposition provided adequate opportunity to be heard regarding the matter). We further note that, contrary to what appellants suggest on appeal, equitable estoppel is not a cause of action, but rather a doctrine that may assist a plaintiff in establishing a claim by precluding a defendant from asserting a truth, which would otherwise be a defense. *Hoye v Westfield Ins Co*, 194 Mich App 696, 707; 487 NW2d 838 (1992). It precludes a party from denying factual matters. See *Holt v Stofflett*, 338 Mich 115, 119; 61 NW2d 28 (1953); see also *Lichon v American Universal Ins Co*, 435 Mich 408, 415; 459 NW2d 288 (1990). Here, the "fact" that Joines was precluded from denying was that the option to purchase had been exercised such that Wickham acquired a right to purchase the property. The probate court determined that this right continued after the September 19, 2000, date set forth in the lease agreement for the purchase to take place. It found that Wickham justifiably relied on the understanding that he could purchase the property, under the option, for seven years.

Appellants' cursory argument on this issue provides no basis for disturbing the probate court's decision. We note only that, contrary to Wickham's argument on appeal, his rights and obligations did not change strictly from those of a tenant to those of a purchaser by virtue of the acceptance of the option. In this regard, Wickham's reliance on *Rosenthal v Shapiro*, 333 Mich 302; 52 NW2d 859 (1952), is misplaced because unlike *Rosenthal*, this case did not involve a land contract where equitable title passed to the vendee, giving the vendee the right to possession without paying rent. Instead, it involved a purchase agreement, which is not the same as a land contract. *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999). A purchase agreement is simply a contract for the sale of land. *Id.* Only the execution of a purchase agreement gives rise to the right of possession. *Lake Forest Partners 2, Inc v Dep't of Treasury*, 271 Mich App 244, 249-250; 720 NW2d 770 (2006), rev'd in part on other grounds 480 Mich 1046 (2008). Therefore, Wickham's mere conversion to impending purchaser status did not terminate his obligations under the lease. Notwithstanding, viewed in a light most favorable to appellants, the submitted evidence established that Wickham accepted the option in the lease agreement and thus had the superior right to purchase the disputed property.

D.

Finally, we reject appellants' argument that Wickham lost any rights under the option by not completing the purchase by September 19, 2000. As indicated previously, this question falls within the scope of the probate court's application of equitable estoppel, and for the reasons set forth earlier, we find no basis for disturbing the probate courts' decision. Further, contrary to appellants' argument on appeal, the time for performance of a contract for the sale of property may be extended by parol. *Burstein v Alldis*, 234 Mich 1, 9; 208 NW 31 (1926); *Kennedy v Brady*, 43 Mich App 760, 762; 204 NW2d 779 (1972). A course of conduct may also waive a time for performance. *Al-Oil, Inc v Pranger*, 365 Mich 46, 53; 112 NW2d 99 (1961); see also *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003). And "where the time fixed by the contract for performance is permitted to pass, both parties concurring, the time of performance thereafter becomes indefinite, and one party cannot rescind until full notice and a reasonable time for performance is given." *Al-Oil, Inc*, *supra* at 53, quoting 17 CJS, Contracts, § 506, pp 1080-1081. Therefore, even assuming that the doctrine of equitable estoppel was not applicable, appellants have not established the materiality of the fact that no written agreement was entered to extend the September 19, 2000, date to complete the sale of the property.

In sum, appellants have not demonstrated any basis for disturbing the probate court's disposition of the parties' cross-motions for summary disposition. Limiting our review to the probate court's resolution of the property dispute between Wickham and Blue Star, we affirm its determination that Wickham had a superior right to purchase the property.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis