IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STEVE COOKE and DANA COOKE, husband and wife, Appellants, v. GILBERT GOETHALS and LETA RAY GOETHALS, husband and wife; and DONALD GOETHALS and DEBRA GOETHALS, husband and wife; and all other persons or parties known claiming any right, title, estate, lien or interest in the real estate described in the Complaint herein, Respondents.	No. 39410-3-II UNPUBLISHED OPINION

Armstrong, J. — Steve and Dana Cooke sued Gilbert and Lena Goethals and the Goethalses' son Don, seeking specific performance of their oral agreement to buy property from the Goethalses. Alternatively, they sought damages for breach of contract and fraud. The Goethalses moved for summary judgment, arguing that the statute of frauds prevented the court from enforcing the Cookes' alleged oral agreement. The trial court granted the Goethalses' motion, dismissing all of the Cookes' claims. Because issues of material fact exist as to whether the Cookes' evidence of part performance of the alleged oral agreement is sufficient to satisfy the statute of frauds, we reverse and remand.

FACTS

The Cookes and the Goethalses were longtime friends. In May 2001, the Cookes talked with the Goethalses' son Don, a realtor, about buying property in the Lake Tapps area. The Cookes wanted property with an outbuilding suitable for building and storing a helicopter, as well

as property large enough to build a home for Steve Cooke's mother. Don said that his parents had property they wanted to sell that might be suitable.

The Cookes looked at the property, which was vacant except for a free-standing garage, and decided it would serve their purposes. The Goethalses offered to sell the property for $60,000. The Cookes agreed to the price but were unable to obtain financing until the Goethalses resolved a lot line adjustment issue. After the Goethalses assured the Cookes that the lot line adjustment would not be a problem, the parties agreed to a 30-year amortization of the purchase price to establish the Cookes' monthly payment. Don calculated that with an interest rate of six to seven percent, including taxes, the monthly payment would be $350. The parties further agreed to treat their arrangement like a sale on a real estate contract with a balloon payment in five years, after the Cookes obtained a loan. There was no written agreement reflecting any of these terms.

Steve Cooke attempted to resolve the lot line problem, but county officials said it was the Goethalses' responsibility. The Goethalses agreed to resolve it. The Cookes continued to make their monthly payments. They also removed garbage from the property and rebuilt the front of the garage, spending $6,000 to $7,000. In December 2007, a Federal Express truck accidentally ran into the garage, knocking out the power. The Goethalses offered suggestions to the Cookes about how to recover the cost of repairs but made no attempt to take care of the problem. In May 2008, the Cookes found loggers on the property clearing trees and confronted Don, who apologized and said that the trees should not have been cut down.

The Cookes made monthly payments from May 2001 until the Goethalses asked to meet

with them in October 2008. At the meeting, the Goethalses stated that they had recently obtained the lot line adjustment and would now sell the property to the Cookes for $100,000. The Goethalses added that a neighbor was interested in buying the property for $130,000 to $140,000 but that they would give the Cookes a discount. The Cookes responded that the Goethalses should sell the property to their neighbor for $130,000 to $140,000, keep the $100,000 they were willing to accept from the Cookes, and pay the difference to the Cookes to offset their damages and losses.

The Goethalses responded by serving the Cookes with a notice requiring them to remove their personal property by December 31, 2008. The Cookes then sued, seeking specific performance of the sales agreement or damages for breach of contract and fraud. They also filed a lis pendens on the property. The Cookes stopped their monthly payments to the Goethalses in December 2008, paying them instead into the court registry. They vacated the property a few months later.

The Goethalses moved for summary judgment, arguing that no written sales agreement existed and that any oral agreement was barred by the statute of frauds, that the lis pendens should be vacated, and that the court should restore their possession of the property. In a supporting declaration, Don stated that his family had offered the property to the Cookes for $65,000 but that the Cookes could not afford that price and had asked to rent the property for $350 per month. The Goethalses paid property taxes throughout the Cookes' tenancy.

The Cookes responded by insisting that they had never intended to rent the property and that their purchase plans had been thwarted solely by the Goethalses' failure to obtain the lot line

adjustment. Steve Cooke alleged that the Goethalses waited until the property had appreciated in value to get the lot line issue resolved, intending to keep the Cookes' money by calling it rent or forcing them to pay more to buy the property. He added that he had noted on his checks to the Goethalses that the payments were for "mortgage." CP at 41. Todd Bohon, a longtime friend of the Cookes, stated that he heard the Cookes talking with the Goethalses in 2001 about their plans for the property and knew that the Cookes wanted to purchase it. He also heard the parties discussing the lot line issue that had to be resolved before Cooke could get financing. Bohon stated that the parties spoke specifically about why the Cookes were purchasing the property and talked of it as being the Cookes' property. "[T]here was absolutely no question, that the property was being sold to, and purchased by, Mr. Cooke[.]" CP at 53.

Kevin Eliason, who works in the mortgage industry and knows both families, stated that the Cookes met with him in 2001 about obtaining financing to purchase property in Lake Tapps. Eliason walked the property with both Steve Cooke and Don and learned of Cooke's plans for the property as well as the lot line issue. Eliason added that he did "not ever see any copies of a purchase and sale agreement nor did [he] know of any price discussions or agreements." CP at 55. He also stated, however, that the Cookes were qualified to purchase the property at that time.

The trial court granted the Goethalses' motion for summary judgment and dismissed the Cookes' claims with prejudice. In the same ruling, the court vacated the lis pendens and restored possession of the property to the Goethalses. The court subsequently denied the Cookes' motion for reconsideration, disbursed the funds in the court registry to the Goethalses, and struck the

Goethalses' request for attorney fees. The principal issue is whether the Cookes' claimed part performance of the oral agreement avoids a strict application of the statute of frauds and would allow the trial court to enforce the agreement.

ANALYSIS

A. Standard of Review

We review a summary judgment motion de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In reviewing a summary judgment motion, we consider the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wn. App. 323, 329, 2 P.3d 1029 (2000).

B. Statute of Frauds and Part Performance

The real estate statute of frauds provides that "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]" RCW 64.04.010; *Firth v. Lu*, 146 Wn.2d 608, 614, 49 P.3d 117 (2002). Every deed, in turn, "shall be in writing, signed by the party bound thereby, and acknowledged . . . ." RCW 64.04.020. The statute of frauds is intended to prevent fraud in contractual undertakings. *Firth*, 146 Wn.2d at 614. More specifically, its purpose is to prevent fraud "arising from *uncertainty* inherent in oral contractual undertakings." *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971).

The Goethalses argue at the outset that the parties had only an agreement to agree, which is unenforceable as a matter of law without resort to the statute of frauds. *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004). The *Keystone* court explained that an agreement to agree is an agreement to do something that requires a further

meeting of the minds, without which it would not be complete. *Keystone*, 152 Wn.2d at 175. The Goethalses also cite the required elements of a contract and point out that few of these terms were discussed or agreed upon by the parties. *See Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 128-29, 881 P.2d 1035 (1994) (holding that agreement did not escape the statute of frauds partly because it did not contain the 13 material terms of a real estate contract).[1]

In *Keystone*, the parties began negotiations to enter into a purchase and sale agreement, but never agreed on how to proceed and no contract was formed. *Keystone*, 152 Wn.2d at 179-80. The circumstances here are distinguishable. The Cookes argue that offer and acceptance occurred in 2001 and that no further agreement was contemplated or required. They concede that their agreement was oral but argue that it survives the statute of frauds under the part performance exception.

Courts have upheld oral agreements under the part performance exception to the statute of frauds without reference to the 13 material terms outlined in *Sea-Van*. *See*, *e.g.*, *Pardee v. Jolly*, 163 Wn.2d 558, 182 P.3d 967 (2008); *Powers v. Hastings*, 93 Wn.2d 709, 612 P.2d 371 (1980); *Miller*, 78 Wn.2d 821. Because the statute of frauds is intended to prevent fraud, courts will not apply it to protect or perpetrate a fraud. *Miller*, 78 Wn.2d at 825-26.

> [W]here one party to an oral contract for the sale of land has, in reliance on the contract, so far performed his part thereof that it would be a fraud upon him to allow the other party to repudiate the contract by invoking the statute of frauds, equity will regard the case as removed from the operation of the statute.

[1] Those terms are the time and manner of transferring title; the procedure for declaring forfeiture; allocation of risk with respect to damage or destruction; insurance provisions; responsibility for taxes, repairs, water and utilities; restrictions on capital improvements, liens, removal or replacement of personal property and types of use; time and place for monthly payments; and indemnification provisions. *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993).

Richardson v. Taylor Land & Livestock Co., 25 Wn.2d 518, 528, 171 P.2d 703 (1946) (quoting 49 Am. Jur. 725, *Statute of Frauds* § 421). Consequently, an agreement to convey real property may be proved without a writing given sufficient part performance. *Miller*, 78 Wn.2d at 826.

In determining whether there is sufficient part performance to "remove" an oral contract for the sale of real property from the operation of the statute of frauds, courts consider whether there has been delivery and assumption of actual and exclusive possession; payment or tender of consideration; and the making of permanent, substantial, and valuable improvements in accordance with the contract. *Powers*, 93 Wn.2d at 717. Although all three factors are not required, a strong case for applying the part performance doctrine exists where all three are established. *Pardee*, 163 Wn.2d at 567; *Richardson*, 25 Wn.2d at 529. Judicial relief may include specific performance or the recovery of legal damages if the property has been transferred to another purchaser. *Miller*, 78 Wn.2d at 830.[2]

Part performance removed an option to purchase property from the statute of frauds where the plaintiff maintained actual and exclusive possession of a residence for one year before seeking specific performance; where he paid $16,000 for the option; and where he made permanent, substantial, and valuable improvements to the residence at a cost exceeding $20,000. *Pardee*, 163 Wn.2d at 564, 568. Another option contract escaped the statute of frauds where the plaintiffs had actual, exclusive possession of a farm pursuant to the parties' agreement; the initial payments of $1,000 per month increased to $1,500 after a year and substantially exceeded the

[2] Legal damages also may be appropriate where the defendant has been unjustly enriched, even if the part performance is insufficient. *Miller*, 78 Wn.2d at 830. The Cookes assert that the trial court erred in dismissing their claim for damages, but they do not support this assertion with argument or authority and therefore do not preserve it as a separate claim for relief. RAP 10.3(a)(6).

defendants' bank payments on the property; the parties agreed that plaintiffs would pay taxes and insurance; and the plaintiffs spent $14,520 to improve the farm. *Powers*, 93 Wn.2d at 717-18.

Part performance of an alleged oral agreement for the exchange of property was not established, however, where the plaintiff never possessed the property and made no improvements to it. *Richardson*, 25 Wn.2d at 530-31. That the plaintiff paid for the livestock on the property was of no consequence as he sustained no loss on it. Furthermore, the court noted that paying the purchase price, in whole or in part, is not alone sufficient part performance to avoid the statute of frauds. *Richardson*, 25 Wn.2d at 530; *see also Berg v. Ting*, 125 Wn.2d 544, 558, 886 P.2d 564 (1995) (consideration alone is insufficient evidence of part performance).

The Cookes assert that they have satisfied all of the part performance factors. They point out initially that they had exclusive possession of the property for almost seven years. Although the Goethalses respond that the Cookes had possession only as tenants, the fact remains that they had sole possession. The Cookes argue that their possession as owners is shown by the Goethalses' reaction to the Federal Express incident, by the Goethalses' failure to draw up a lease agreement or increase the "rental" payments, and by the fact that the Cookes removed garbage from the property at their own expense. (The Cookes did not restore power to the garage after the Federal Express incident, however, nor did they repair the broken overhang to the garage entrance.)

As for consideration, the Goethalses assert that they continued to pay the property taxes while the Cookes possessed the property. The Cookes respond that they paid the consideration the Goethalses requested; that no down payment was required; that it was not their fault they

could not obtain financing; that the property taxes were amortized into their monthly payment; and that there is no support for the Goethalses' claim that they could not afford to purchase the property. The Cookes add that they paid more than $42,000 in monthly payments.

The Goethalses also argue that the $2,000 the Cookes spent on the garage was minimal. The Cookes respond that they were barred from obtaining building permits until the property was in their name and that there was no structure other than the garage to improve. They also argue that the money they spent to modify the garage and clean up the property equaled approximately 10 percent of the purchase price.

The Goethalses further contend that the Cookes are not entitled to specific performance because they breached any existing contract by missing their monthly payment in May 2008 and by stopping their payments altogether after December 2008. *See Ferris v. Blumhardt*, 48 Wn.2d 395, 402, 293 P.2d 935 (1956) ("One in default cannot enforce specific performance of a contract."). The Cookes respond that, because of their lawsuit, they paid the outstanding payments into the court registry and committed no breach.

When viewed in the light most favorable to the Cookes, we find that the facts show sufficient part performance to invoke the exception to the statute of frauds. Consequently, we reverse the trial court's summary dismissal of the Cookes' breach of contract claim.

C. Fraud

The Cookes argue in the alternative that they are entitled to damages for fraud. They argue that if the statute of frauds applies to their agreement, it leads to the determination that they were tenants and thus defrauded because they reasonably believed they were purchasing the

property.

To recover for fraud, a party must prove: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely on it; and (9) his consequent damage. *Williams v. Joslin*, 65 Wn.2d 696, 697, 399 P.2d 308 (1965). All of the elements must be present; the absence of any is fatal to recovery. *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958).

The Goethalses argue that the Cookes failed to plead fraud with particularity, as required under CR 9(b). The Cookes' fraud claim clearly rests on the facts cited to support their breach of contract claim, however, and those facts detail with sufficient particularity the "circumstances constituting fraud or mistake." CR 9(b); *see also Pedersen v. Bibioff*, 64 Wn. App. 710, 721, 828 P.2d 1113 (1992) (CR 9(b) satisfied if facts pleaded are sufficient to present question of fraud). In a related claim, the Goethalses argue that the Cookes have not shown any genuine issue of material fact regarding fraud, as they must in responding to a summary judgment motion. CR 56(e). The Cookes' three responsive declarations assert that they assumed they were purchasing the property based on statements the Goethalses made and that the Goethalses' current assertion that they intended only to rent the property constitutes fraud. These documents are sufficient to raise issues of material fact regarding the Cookes' fraud claim. Moreover, the Cookes' brief addresses each element of fraud. Although that discussion does not cite to the record, as the Goethalses point out, the citations to the record in the statement of facts are sufficient to preserve

this issue for review. *See* RAP 10.3(a)(5), (6).

The Goethalses argue further that the Cookes' fraud claim is barred by the economic loss rule. Under this rule, plaintiffs who are parties to a contract are prohibited from recovering "economic losses" in a tort action arising out of the contract because "tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement." *Alejandre v. Bull*, 159 Wn.2d 674, 682, 153 P.3d 864 (2007) (internal quotations marks omitted) (quoting *Factory Mkt., Inc. v. Schuller Int'l, Inc.*, 987 F. Supp. 387, 395 (E.D. Pa. 1997)). We recently held that the economic loss rule barred a fraud claim because economic remedies existed. *Poulsbo Group, LLC v. Talon Dev., LLC*, 155 Wn. App. 339, 347, 229 P.3d 906 (2010).

But for the economic loss rule to apply and preclude tort damages, the parties must have a contract. *Borish v. Russell*, 155 Wn. App. 892, 901, 230 P.3d 640 (2010) (citing *Water's Edge Homeowners Ass'n v. Water's Edge Assocs.*, 152 Wn. App. 572, 590, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010)). Thus, if the Goethalses want to assert that the fraud claim is barred, they must concede that a contract exists. They cannot contend both that there is no contract and that there can be no recovery for fraud based on the economic loss rule. Thus, the trial court erred in dismissing the Cookes' fraud claim.

The Cookes also argue that the trial court erred in vacating their lis pendens. If the title to real property is in issue, a notice of lis pendens may be used to preserve title against subsequent purchasers. 20 Kenneth W. Weber, Washington Practice: Family and Community Property Law, § 32.53, at 240 (1997). A lis pendens gives notice of the court's jurisdiction over property

involved in a lawsuit pending the continuance of the action. *Wash. Dredging & Improvement Co. v. Kinnear*, 24 Wash. 405, 406, 64 P. 522 (1901). Because we have held that the Cookes' claim to the property is not barred by the statute of frauds, we also vacate the trial court's lis pendens order and the court's order restoring possession of the property to the Goethalses.

Finally, as the prevailing parties, the Cookes are entitled to statutory attorney fees and costs on appeal, according to their request under RAP 14.1. *See* RAP 14.3.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.