

STATE OF MICHIGAN
COURT OF APPEALS

JAMES MONDICH,

Plaintiff-Appellant,

v

SUSAN L. HORSTMANN and DOUGLAS L.
HORSTMANN,

Defendants-Appellees.

UNPUBLISHED

October 7, 1997

No. 197293

Cass Circuit Court

LC No. 95-000899 CH

Before: Doctoroff, P.J., and Cavanagh and Saad, J.J.

MEMORANDUM.

Plaintiff appeals by right a judgment which, in pertinent part, denies plaintiff specific performance of an option to purchase two parcels of real property. After a bench trial, the circuit court concluded that because the options to purchase were signed only by defendant Susan Horstmann and relate to property held by the entireties, the statute of frauds precludes enforcement of the agreement when not also signed by Douglas Horstmann.

During the discovery phase of the proceedings, plaintiff submitted requests for admissions pursuant to MCR 2.312 to each defendant separately. Neither defendant responded within the time permitted, and each was therefore deemed to have admitted all such facts. MCR 2.312(B)(1). Except on motion granted by the trial court, permitting withdrawal or amendment of such admissions, such admissions are conclusive. MCR 2.312(D)(1). Defendants filed no such motion, and the circuit court therefore erred in allowing them to contradict such admissions at trial. *Woodrow v Johns*, 61 Mich App 255; 232 NW2d 688 (1975).

The question remains whether such error is one warranting appellate relief. The admissions establish that the two options were in writing and signed by defendant Susan Horstmann, who accepted a total of \$600 in earnest money from plaintiff -- not returned as of the time of trial. Douglas Horstmann admitted that he and his wife Susan Horstmann agreed to convey the property described in the two options once the condition precedent, their own consummation of a purchase agreement with the original owners, was fulfilled.

Accordingly, the Horstmanns became vested of the fee title to the property as tenants by the entireties. *Tamplin v Tamplin*, 163 Mich App 1, 5; 413 NW2d 713 (1987); *Hoyt v Winstanley*, 221 Mich 515; 191 NW 213 (1922). Neither spouse can convey alone any separate interest in property held by the entireties. *Berman v State Land Office Board*, 308 Mich 143, 144; 13 NW2d 238 (1944). Ordinarily, an agreement signed by only one of several cotenants owning an undivided interest in realty is void under the statute of frauds. *Fields v Korn*, 366 Mich 108; 113 NW2d 860 (1962).

However, where both defendants have benefited from the agreement, which is admitted, the agreement is taken out of the statute of frauds and equity will prevent the husband from violating his part of the contract in fraud of plaintiff. *Carmichael v Carmichael*, 72 Mich 76, 85-86; 40 NW 173; 16 Am St Rep 528 (1888). Where, as here, one spouse, a realtor/broker, is allowed by the other spouse to act for both in real estate transactions, the statute of frauds cannot be turned into an instrument of fraud to defeat a suit for specific performance by an innocent purchaser. *Hatch v Wolack*, 316 Mich 258; 25 NW2d 191 (1946); *McCrea v Jerkatis*, 320 Mich 309, 313; 31 NW2d 63 (1948).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Henry W. Saad