STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND D. LOFGREN and TRUDY D. LOFGREN,

Plaintiffs-Appellants,

v

TIMOTHY J. ENGLISH, THERESA ANN KELLEY ENGLISH, and CHESTER G. KELLEY,

Defendants-Appellees.

UNPUBLISHED
March 20, 1998

No. 201289
Cheboygan Circuit Court
LC No. 96-005807 CH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

In this contract action involving a right of first refusal, plaintiffs appeal by right from a trial court order granting summary disposition in favor of defendants. While plaintiffs argue that it was error to grant defendants' motion pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10), the trial court stated that it was granting summary disposition pursuant to MCR 2.116(C)(8). Accordingly, we will limit our review to whether the trial court erred in granting defendants' motion pursuant to MCR 2.116(C)(8). We reverse and remand.

We review the grant of summary disposition based on the failure to state a claim de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; ___ NW2d ___ (1997). A motion under MCR 2.116(C)(8) is properly granted when the party opposing the motion "has failed to state a claim upon which relief can be granted." MCR 2.116(C)(8); *Radtke v Everett*, 442 Mich 368, 373; 505 NW2d 155 (1993). A (C)(8) motion tests the legal sufficiency of a claim by the pleadings alone, unsupported by any other documentary evidence. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995). However, the trial court may properly consider documents attached to pleadings concerning purchase agreements, which "[were] attached to Plaintiff's complaint and became part of the complaint for all purposes." *Soloman v Western Hills Development Co (After Remand)*, 110 Mich App 257; 312 NW2d 428 (1981); *Soloman v Western Hills Development Co*, 88 Mich App 254; 276 NW2d 577 (1979). A motion for summary disposition under MCR 2.116(C)(8) should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could

possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Abb Paint Finishing, Inc v National Union Fire Ins*, 223 Mich App 559, 561; 567 NW2d 456 (1997).

Plaintiffs argue that the trial court erred in holding that the right of first refusal terminated upon Betty Carlson's death. In *Waterstradt v Snyder*, 37 Mich App 400, 402-403; 194 NW2d 389 (1971), this Court restated the general rule regarding the effect of the death of one of the parties on a contract involving a right of first refusal:

> "There is a strong tendency to construe an option or pre-emption to be limited to the lives of the parties, unless there is clear evidence of a contrary intent." [*Waterstradt, supra* at 403, citing *Old Mission Peninsula School Dist v French*, 362 Mich 546, 549; 107 NW2d 758 (1961).]

While this rule establishes a high burden of proof for overcoming the presumption that the grantor intended the right of first refusal to terminate with the death of one of the parties, plaintiffs requested at the hearing on defendants' motion that they be given an opportunity to allege facts to rebut that presumption. Plaintiffs' claim may be enforceable if plaintiffs can prove facts to indicate that Betty Carlson had a clear intent to bind her successors to her right of first refusal contract with plaintiffs. MCR 2.118(A) provides that "leave to amend shall be freely given where justice requires." MCR 2.118(A). In *Ben P Fyke & Sons v Gunter Co*, the Michigan Supreme Court stated:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." [*Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).]

Furthermore, "[a] court that denies a party's motion to amend must specify one of these reasons in its denial, and a failure to do so constitutes error requiring a reversal unless such amendment would be futile." *Terhaar v Hoekwater*, 182 Mich App 747, 751; 452 NW2d 905 (1990).

In the instant case, it is not apparent that it would be futile to allow plaintiffs to amend their pleadings. Plaintiffs asserted during the motion hearing that they would be able to offer proof of Betty Carlson's clear intent to have the right of first refusal bind persons other than herself. If plaintiffs' pleadings had contained a factual allegation that Betty Carlson's clear intent was to bind her successors in interest to the contract with plaintiffs, summary disposition under MCR 2.116(C)(8) would not have been proper. We conclude that the trial court should have allowed plaintiffs the chance to amend their pleadings to allege facts that could satisfy this element of their claim.

Reversed and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer