

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

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In re HELEN MOONEY TRUST.

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BRIAN H. MOONEY,  
  
Petitioner-Appellant,

UNPUBLISHED  
February 8, 2002

v

No. 223943  
Cheboygan Probate Court  
LC No. 97-011488-TI

LYNN G. STEDMAN,  
  
Respondent-Appellee.

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Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

Petitioner appeals as of right the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10) denying his amended petition for surcharge of respondent. We affirm.

I. Basic Facts and Procedural History

The Helen Mooney Trust (hereinafter "trust") was created on November 5, 1994. The beneficiaries of the trust were Helen's three children: petitioner Brian Mooney, Margaret Daly, and John Mooney. After his mother's death, petitioner served as successor trustee of the trust from early 1996 through October 13, 1997. He resigned as trustee following a dispute with one of the trust beneficiaries<sup>1</sup> regarding the distribution of trust assets.

Respondent Stedman was appointed as successor trustee to resolve the dispute and to administer the assets of the trust. One such asset was a parcel of land in Beaugrand Township, Cheboygan County known as "the Woods." On December 19, 1997, respondent entered into a sales contract with Terrance and Rose Prykucki for the sale of the Woods. The Prykuckis made

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<sup>1</sup> The dispute was between Brian Mooney and his deceased brother's widow, Evelyn. John Mooney died on October 18, 1996. His widow, Evelyn, assumed his interest as beneficiary of the trust.

an offer of \$95,000 in cash for the Woods, which respondent accepted.<sup>2</sup>

Thereafter, petitioner filed a petition for surcharge of successor trustee<sup>3</sup> alleging respondent breached his fiduciary duty by selling the Woods without petitioner's knowledge or permission, and further claimed that he had a right of first refusal on the Woods. Respondent filed a motion for summary disposition. The trial court granted the motion and subsequently denied plaintiff's motion for reconsideration. Plaintiff appeals as of right and we affirm.

## II. Standard of Review

The trial court's decision on a motion for summary disposition is reviewed de novo. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual basis underlying a claim and permits summary disposition when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 85; 514 NW2d 185 (1994). In deciding the motion, the trial court considers the affidavits, pleadings, depositions, and other documentary evidence in a light most favorable to the opposing party to determine whether reasonable minds could differ regarding an issue of material fact. *Adell v Sommers, Schwartz, Silver & Schwartz, PC*, 170 Mich App 196, 204; 428 NW2d 26 (1988).

## III. Judicial Review of Trustee's Actions

Petitioner first argues that the probate court applied the incorrect standard of review relative to the trustee's actions. He alleges that the standard should be negligence – not an abuse of discretion. We disagree. A trustee's actions in selling trust property are reviewed under an abuse of discretion standard. *In re Ansell Family Trust*, 224 Mich App 745, 749; 569 NW2d 914 (1997).

Furthermore, MCL 700.813, in effect at the time of the events in question<sup>4</sup> provides:

*Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills. [Emphasis added.]*

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<sup>2</sup> When petitioner was acting as the trustee, he had received an appraisal of the Woods for \$109,000.

<sup>3</sup> The original petition was filed on October 27, 1998 but was amended on March 12, 1999.

<sup>4</sup> We note that this statutory provision was subsequently repealed and replaced by MCL 700.7302; 1998 PA 386, § 7302, Eff. April 1, 2000.

Here, the terms of the trust cloak the trustee with broad discretion in disposing of trust property:

SEVENTH: The Trustee hereunder shall have the following powers and authority in respect of all property embraced within every trust estate herein provided, as follows:

A. To take possession of the trust property, and to collect and receive the moneys, interests, profits and income arising therefrom, with full power in the Trustee to manage, invest and reinvest the same and all such trust estate in any kind of property, personal and real, including by way of illustration: bonds, . . . stocks of any class, mutual funds, bank accounts, mortgages and other investments and property as in the discretion of the Trustee may seem most advantageous to such trust estate and the beneficiaries thereof, . . . *to mortgage, pledge, partition, improve, repair, surrender, abandon and distribute or otherwise dispose of or deal with all of the trust property, or any part thereof, or any interest therein, including right of ways and easements, at such time or times and in such manner, either public or probate, and upon such terms as in the absolute and uncontrolled discretion of the Trustee may seem expedient and proper,* including the mortgaging and pledging of all or any part of the trust property as collateral for loans or other financial accommodations made to the Grantor in her individual capacity by any financial institution; . . . [Emphasis added.]

Because of the broad language contained in the trust document and since this Court has expressly held that an abuse of discretion standard should be applied to the adequacy of a price obtained by a trustee for a piece of trust property, in the absence of bad faith, unfair dealings, or a conflict of interest, *In re Ansell, supra* at 749, we find that the probate court applied the appropriate standard of review.

#### IV. Statute of Frauds

Petitioner argues next that the trial court committed error in holding that the statute of frauds barred his claim because he was not attempting to assert an interest in land; rather, he was claiming that respondent had committed a breach of his fiduciary duties. Whether the statute of frauds bars enforcement of a purported contract is a question of law we review de novo. *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995).

The statute of frauds prevents any interest in land from being created in the absence of a writing. MCL 566.106. The validity of an agreement to sell real property depends upon the existence of a writing containing all essential terms of the agreement and signed by the party to be charged. *Zurcher v Herveat*, 238 Mich App 267, 280-281; 605 NW2d 329 (1999). (Citation omitted.)

In the instant case, it is undisputed that no writing exists which purports to grant petitioner a right of first refusal for the sale of the Woods.<sup>5</sup> Consequently, petitioner's claim is barred by operation of the statute of frauds. Accordingly, no genuine issue of material fact exists upon which reasonable minds could differ thus rendering summary disposition appropriate.

#### V. Factual Findings

Petitioner next alleges that the trial court erred in its factual finding that petitioner's claim was not brought on behalf of all the beneficiaries.

The fact that petitioner's sister's name appears on the amended petition but was overlooked by the trial court in its opinion is irrelevant because petitioner was unable to establish that respondent breached any fiduciary duty. Whether the probate court made a misstatement of fact regarding the number of beneficiaries of the trust is of no consequence to the resolution of the issue whether the fiduciary breached a duty by selling trust property. See MCL 700.7302; *In re Ansell*, *supra* at 749.

#### VI. Promissory Estoppel

Finally, petitioner submits that the trial court also erred in not considering that respondent breached a separate fiduciary duty because he made a promise to petitioner enforceable under theories of assumption of duty and promissory estoppel.

However, to permit petitioner to proceed in equity on the basis of alleged promises, express or implied, would contravene the statutory requirements of a written contract and would otherwise violate the parol evidence rule applicable to contracts. See *Martin v East Lansing School Dist*, 193 Mich App 166, 180; 483 NW2d 656 (1992). Additionally, the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate. See *Hazime v Martine Oil of Indiana, Inc*, 792 F Supp 1067 (ED Mich, 1992). On the facts and circumstances presented in this case, equity does not dictate that this Court relieve petitioner from the requirements of the statute of frauds.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>5</sup> The only writing connected to this property is a reference in defendant's October 28, 1997 letter stating: "I plan to include a clause in the listing agreement indicating that each heir has 30 days, from the date of listing, to purchase the property, without any commission being paid." This cannot be construed as a right of first refusal.