STATE OF MICHIGAN

COURT OF APPEALS

JOHN SCHEFFLER,

Plaintiff-Appellant,

v

MARY ANN ALSGAARD and KIM FENNEL,

Defendants-Appellees.

UNPUBLISHED
March 5, 2002

No. 225215
Oceana Circuit Court
LC No. 99-001106-CH

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Plaintiff appeals from an order granting summary disposition to defendants. We affirm.

Plaintiff first argues that he had standing to sue defendants under MCL 600.2932, and that defendants should have been precluded from disputing his standing because they did not timely plead it as an affirmative defense. He did not raise the timeliness of defendants' standing argument in the trial court, so that issue is not preserved on appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). An alleged mistake by the trial court not raised below is reviewed for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) and the plain error affected substantial rights. *Id.*

A land contract vendee is vested with equitable title in the land. *Charter Twp of Pittsfield v City of Saline*, 103 Mich App 99, 103; 302 NW2d 608 (1981). As long as the land contract vendee is in possession of the land, he or she may bring a quiet title action. *Stewart v Oliwek*, 75 Mich App 218, 219; 255 NW2d 9 (1977). This Court has, by implication, confirmed that a quiet title action may be brought against a remainderman. See *VanAlstine v Swanson*, 164 Mich App 396, 400; 417 NW2d 516 (1987), lv den 430 Mich 885 (1988); MCL 600.2932(1). Whether Scheffler himself may sue defendants requires further analysis, however.

Issues related to capacity to sue, other action pending, and affirmative defenses must be raised not later than the first responsive pleading. MCR 2.116(D)(2); *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 319; 503 NW2d 758 (1993). The defense of capacity to sue encompasses standing. See *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). Defendants failed to raise standing as an affirmative defense in their first responsive pleading; therefore, such defense was waived. *Stanke, supra* at 319. It was plain error for the

trial court to find that Scheffler lacked standing when defendants had waived the issue. However, the error did not affect Scheffler's substantial rights, because sufficient other grounds supported the trial court's grant of summary disposition in favor of defendants.

One of those grounds was that Scheffler was not the real party in interest. To entitle a plaintiff to a decree quieting title, he must establish title in himself. *Wilhelm v Herron*, 211 Mich 339, 345; 178 NW 769 (1920). As against a defendant's record title a plaintiff must prevail, if at all, upon the strength of his own title rather than the weakness of the defendant's. *Id*. If his proofs fail to establish title in himself, his action must likewise fail. *Id*.

When Scheffler entered into the land contract with Sterling, he purchased "her entire interest" in the property. This included only her life estate in fee and two one-fifth joint tenancy remainder interests. It is patently clear that Scheffler agreed to try to acquire the other two one-fifth remainder interests after the land contract was executed. The evidence in the record shows that defendants hold record title to those two remainder interests. Scheffler could only prevail by showing superior title in himself, which he cannot do. *Id.* Thus, the trial court correctly found that Scheffler was not the proper party to bring this quiet title action.

Scheffler next argues that the trial court should not have granted summary disposition in favor of defendants under MCR 2.116(C)(8) or (C)(10). This Court reviews de novo an order granting summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court did not specify which subsection of the rule on summary disposition it applied in finding for defendants but it is clear from the record that the decision was based on MCR 2.116(C)(10), so this Court may proceed as though the decision were based on MCR 2.116(C)(10). *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Id*. The nonmoving party may not rest on its pleadings but must demonstrate a factual issue using documentary evidence. *Id*.

Besides the standing and real-party-in-interest bases, the trial court granted defendants' motion for summary disposition because Scheffler's other claims were without merit. Those claims were that: (a) the transfers to defendants were ineffective donative gifts; (b) the transfers to defendants were testamentary in character, and could not have been consummated by a deed; and (c) the deeds were intended to correct boundary defects, not to transfer title.

The three elements necessary to constitute a valid gift are these: (1) that the donor must possess the intent to pass gratuitously title to the donee; (2) that actual or constructive delivery be made; and (3) that the donee accept the gift. *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965) (citations omitted). It is essential that title pass to the donee. *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993).

Recordation gives rise to a presumption of intent and delivery, and because Scheffler does not dispute that delivery was effective, the trial court was not precluded from taking both delivery and intent as established. Acceptance may be presumed in this case, because the gift of real property was beneficial. *Osius*, *supra* at 611.

Title patently passed to defendants. There were no conditions explicitly attached to the gift, nor were there any allegations that Sterling told her children they could only have the property if they agreed to give it back upon request. Defendants' interest vested at the time the deeds were executed, MCL 554.13; *Detroit Bank and Trust Co v Grout*, 95 Mich App 253, 278; 289 NW2d 898, lv den 409 Mich 894 (1980), and therefore were beyond the power of recall by Sterling. *Osius, supra* at 611. All the requirements for a valid gift were fulfilled.

A testamentary disposition is one created by or relating to a will. *Blacks Law Dictionary*, 7th Ed., 1484. A deed may be considered testamentary in character when it is to be delivered after the grantor's death. *Hynes v Halstead*, 282 Mich 627, 636-637; 276 NW 578 (1937). Here, however, the deed was delivered while Sterling was still living. Defendants' interests vested at the time of execution. MCL 554.13; *Detroit Bank and Trust, supra* at 278. Therefore, the deed was not a testamentary disposition.

The fact that the deed contained both language of grant and language correcting a boundary description does not render it ambiguous. Despite Scheffler's arguments to the contrary, the intent of the parties is clearly expressed in the deed. It both quitclaims a one-fifth remainder interest to each of Sterling's children and corrects a boundary description in accordance with a new survey. Considering the whole instrument, it is not ineffective due to ambiguity.

Scheffler next argues that it was error requiring reversal for the trial court to award sanctions in favor of defendants. This Court reviews a trial court's order of sanctions for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 177-178; 568 NW2d 365 (1997). Costs and attorney fees may be assessed under MCL 600.2591 when a party brings a "frivolous" action; this includes one in which the party's legal position is devoid of arguable legal merit. MCL 600.2591(3)(a)(iii). Although the trial court erred in finding that Scheffler lacked standing to bring this action, it properly found that he was not the real party in interest; hence, his position lacked arguable legal merit. The requirements of MCL 600.2591(3)(a)(iii) were met. Further, the amount of costs and fees awarded to defendants was reasonable under MCL 600.2591(2). Because the sanction award was clearly supported by the record, there was no abuse of discretion.

On appeal, defendants argue that additional sanctions should be imposed on Scheffler. This Court may award sanctions if it determines that an appeal is vexatious; i.e., it was taken without any reasonable basis for belief that there was a meritorious issue to be determined on appeal. MCR 7.216(C)(1); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 169; 550 NW2d 846 (1996). It is clear that the trial court committed error when it found that Scheffler did not have standing. That the error did not amount to error requiring reversal does not mean that Scheffler had no reasonable basis for believing that there was a meritorious issue to be determined on appeal. Although the other issues raised by Scheffler are without merit, the fact that there was one issue that merited review means his appeal was not vexatious. *Id.* at 169. We decline to award additional sanctions on appeal.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra