

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM E. KASBEN,

Plaintiff-Appellant,

v

JOSEPH T. KASBEN, JOHN M. KASBEN, and
BARBARA FIEBING,

Defendant-Appellees,

and

BERYL W. KASBEN, a/k/a BERYL W.
HOFFMAN, a/k/a BERYL MARLENE WILSON,

Defendant,

and

EDWIN J. KASBEN,

Defendant/Plaintiff-Appellant.

Before: Cooper, P.J. and Bandstra and Kelly, JJ.

PER CURIAM.

In this quiet title action, plaintiffs William Kasben and Edwin Kasben¹ appeal as of right an order of judgment entered following a bench trial, which, in pertinent part, rendered judgment in defendants' favor. Plaintiffs also appeal a previous order granting summary disposition in defendant's favor. We affirm in part, reverse in part and remand.

¹ Although William Kasben initially named Edwin Kasben as a defendant in his complaint, he later joined in a motion with Edwin Kasben to have Edwin Kasben act as a plaintiff as to certain counts. In this issues on appeal, Edwin Kasben acts as a plaintiff joining in William Kasben's appeal. Therefore, all references in this opinion to defendants do not include Edwin Kasben.

I. Summary Disposition

Plaintiffs first contend that the trial court erred in granting summary disposition in defendants' favor on the basis that the agreements were void. We agree.

"A trial court's decision to grant or deny summary disposition under MCR 2.116(C)(10) is subject to review de novo. Under this court rule, a party is entitled to summary disposition when 'there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law.'" *DNR v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 368-369; ___ NW2d ___ (2005), quoting MCR 2.116(C)(10). This issue also requires us to interpret contractual terms:

The construction and interpretation of an unambiguous contract is a question of law that we review de novo. Whether terms of a contract are ambiguous is also a question of law that we will review de novo. In determining whether a contract provision is ambiguous, we are to give the language used its ordinary and plain meaning, to see if "its words may reasonably be understood in different ways." "[I]f a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts," summary disposition should be granted to the proper party. [*Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 658; 651 NW2d 458 (2002) (citations omitted).]

The record evidence indicates that on February 29, 1996, William Kasben conveyed properties referred to as Ferguson 40, Ferguson Lane, and Heinforth's farm to Edwin Kasben. The recorded deed included the following provision:

Grantor William E. Kasben reserves an option to purchase the above lands (right of first refusal) when the grantee no longer farms the land or decides to sell it or upon his death. The value of the land is to be determined based on agricultural value.

In a deed dated March 29, 1996, William Kasben quitclaimed the Martin Peplinski Farm to Edwin. The recorded quitclaim deed contained the same provision. In a third deed dated March 30, 1996, Edwin Kasben quitclaimed half of his interest in the Gatzke farm to William Kasben and the other half to himself and William Kasben as joint tenants with rights of survivorship. The deed contained a similar provision:

William E. Kasben and/or his heirs are given first option (first right of refusal) to purchase the one half owned by himself and grantor as joint tenants with rights of survivorship, upon the grantor not farming anymore or the parties so deciding, at the cost of \$12,500.00 total price.

The trial court ruled that these were option contracts that did not meet the requirements of an option contract and were, therefore, void. "An option is basically an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *Osthemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260

(1977). We agree with the trial court that these agreements are options because they provide that William Kasben has the right to buy the property at a specified price and a specified time.

However, the trial court erred in ruling that consideration was lacking. To constitute consideration, a bargained for exchange must exist. *GMC v Dep't of Treasury*, 466 Mich 231, 238; 644 NW2d 734 (2002). Either a benefit to one side or a detriment to the other side must exist. *Id.* at 238-239. Courts generally do not inquire into the sufficiency of consideration. *Id.* In this case, there was a bargained for exchange. William granted Edwin an interest in the land, a detriment to William and a benefit to Edwin. In turn, Edwin granted William an option, a detriment to Edwin and a benefit to William. Therefore, we conclude that the trial court erred in determining that there was no consideration to support these agreements. We reverse this ruling.

The question nonetheless remains what effect the options had on the subsequent conveyances to defendants. With respect to the February 29, 1996 and March 29, 1996 deeds, the above-quoted provision is clear: William Kasben had the right to repurchase the property from Edwin Kasben under the condition that Edwin Kasben 1) stopped farming, 2) decided to sell the property; or 3) died. Plaintiffs concede on appeal that “No factual evidence was introduced that any of these events had yet occurred.” Plaintiffs assert that, despite the transfers to defendants, “title to the lands should still show William Kasben’s right to purchase the property upon the terms specified.” However, the issue of whether these agreements run with the land is not preserved for appellate review because it was never raised before or decided by the trial court. Because resolution of this issue is necessary to the determination of the parties’ interest in the property, we remand for the parties and the trial court to address this issue.²

II. Undue Influence

Plaintiffs next argue that the lower court erred in finding that the May 29, 2001 conveyance to defendants was not void because of undue influence on the part of Barbara Fiebing and John Kasben. We disagree.

We review factual findings for clear error. “A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been committed.” *Vivian v Roscommon Co Bd of Comm’rs*, 164 Mich App 234, 238-239; 416 NW2d 394 (1987).

To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the grantor to act against the grantor’s inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is

² With regard to the March 30, 1996 deed, the option agreement is also valid, contrary to the trial court’s ruling. However, the trial court ruled that defendants had no interest in the Gatzke property. This ruling is not at issue on appeal.

not sufficient. *Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976). [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993).]

At trial, Gary Aschim of the Family Independence Agency testified that he met with Edwin on May 22, 2001. At that meeting, Edwin expressed concerns that William had taken advantage of him and expressed regret at some of the transactions he had entered into with William. However, Aschim found that Edwin was competent to handle his affairs at that time and recommended that Edwin seek legal counsel. Edwin testified that the decision to convey the property from the trust to his children on May 29, 2001, was his own decision and a videotape taken of the signing demonstrates that Edwin understood what he was signing. On the basis of this record evidence, we are not left with a definite and firm conviction that the trial court made a mistake when it found that there was no undue influence in the May 29, 2001 conveyance. Therefore, we affirm the trial court's ruling that there was no undue influence in the May 29, 2001 conveyance.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly