STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of BERNARD J. MULLEN.

PATRICIA ADAMS as the personal representative of the Estate of BERNARD J. MULLEN,

Plaintiff-Appellee,

v

BERTHA L. FAGERMAN,

Defendant-Appellant,

and

ANN PECKHAM,

Defendant.

UNPUBLISHED
July 26, 2011

No. 298039
Oakland Probate Court
LC No. 2009-323104-CZ

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

In this suit to quiet title, defendant Bertha L. Fagerman appeals as of right the probate court's order denying her motion for summary disposition and entering judgment in favor of the Estate of Bernard J. Mullen. On appeal, Bertha Fagerman challenges, on a variety of grounds, the probate court's determination that the decedent, Father Bernard J. Mullen (Fr. Mullen), completed the purchase of the property at issue on land contract. She maintains that, because the facts show that Fr. Mullen had not completed the terms of the land contract, the probate court erred when it quieted title to the property and ordered her to provide Fr. Mullen's estate with a warranty deed. We conclude that there were no errors warranting relief. For that reason, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Carl and Bertha Fagerman owned undeveloped property along a lake in Wexford County, Michigan. In June 1974, they agreed to sell two parcels of their land to Paul and Mary Mullen on land contract for $14,700. Under the terms of the land contract, Paul and Mary Mullen agreed to make an initial payment of $1,470 with additional payments of $100 due every month. The

contract also provided for a 7% interest rate. In a schedule of payments received, Carl Fagerman noted the receipt of payments—generally $100 per month—from February 1975 through September 1980. The schedule showed the balance of principal for each payment period and noted the amount of each payment that applied to interest and principal.

In September 1980, Paul and Mary Mullen assigned their interest in the land contract to Fr. Mullen. Carl and Bertha Fagerman signed the assignment to acknowledge receipt of a copy and to indicate their acceptance of the assignment. The assignment showed that there was a $10,035.07 balance remaining on the land contract. The schedule of payments received showed a balance of $10,038.02 for October 1, 1980.

After the assignment, there were regular $100 payments through October 1985. On the schedule, Carl Fagerman acknowledged receipt of several payments of $100 in 1986, but there were no payments listed for 1987. The schedule shows that Carl Fagerman accepted three payments of $600 and one payment of $800 in 1988. The first payment of $600 shows that $49.43 applied to interest and the remaining $550.57 applied to principal, which left a balance of $5500. Thereafter, the schedule shows that the payments were applied entirely to the principal balance. On the schedule, in handwriting that was later found to be that of Carl Fagerman, there is a notation that "it is agreed that there will be no interest from date last shown here." After the August 1988 payment of $800, the schedule shows a remaining principal balance of $3,500. The schedule lists only one additional payment of $1,000, for which Carl Fagerman acknowledged receipt in February 1998. However, Fr. Mullen issued a $2,000 check to Carl Fagerman, which Carl endorsed and deposited, in July 1999. On the memo line of the check, Fr. Mullen wrote "Property sold to me."

Fr. Mullen died in November 2007 and plaintiff Patricia Adams became the personal representative of his estate. In April 2009, the Mullen Estate's lawyer sent a letter to the Fagermans. In the letter, the Mullen Estate's lawyer claimed that "Fr. Mullen made all of the payments on the land contract and paid all the property taxes," which payments Carl Fagerman acknowledged by initialing the amortization schedule. On that basis, the Mullen Estate's lawyer contended that "Fr. Mullen is the owner of this property" and asked the Fagermans to execute a warranty deed for the property. The Fagermans refused to execute a warranty deed. Instead, the Fagermans sent a letter back to the Mullen Estate's lawyer claiming that "Fr. Mullen" did not make all the payments and declaring the land contract "void and forfeited" for failure to perform.

In May 2009, the Mullen Estate sued the Fagermans and Ann Peckham to quiet title to the property. The Mullen Estate alleged that, since the assignment of the land contract, Fr. Mullen paid off the land contract in full and paid all the applicable property taxes. It also alleged that Fr. Mullen assigned a one-fifth interest in one of the two parcels to Ann Peckham, but that the assignment was never recorded, there was no evidence that she made any payments on the property, and that she had no legal or equitable interest in the property. The Mullen Estate asked the probate court to quiet title to the property in the Mullen Estate and declare that the estate "holds title to [the] property free of any claim . . . ."

In June 2009, the Fagermans responded—*in propriis personis*—by filing combined motions to strike the Mullen Estate's complaint, for summary disposition under MCR 2.116(C)(7), (8), and (10), and for a declaration that the Mullen Estate's complaint was frivolous.

The Fagermans primarily argued that Fr. Mullen breached the land contract by failing to make timely payments and by assigning an interest in the land contract to Peckham without obtaining prior approval. Because the evidence showed that the Mullen Estate knew that Fr. Mullen had breached the contract, the Fagermans maintained that they were entitled to have the complaint stricken and deemed frivolous. In a separate motion filed in the same month, the Fagermans moved for a change of venue.

In September 2009, the Fagermans submitted a supplemental brief in support of their motions. The Fagermans stated that they submitted a request for admissions to the Mullen Estate and that the Mullen Estate did not timely or properly respond to the request. Because the responses were untimely and improper, the Fagermans concluded, they must be "deemed admitted." They also argued that the Mullen Estate's attorney did not comply with the rules governing the substance of the responses and that the response were knowingly false.

The Mullen Estate responded to these filings by stating that its claim was clearly not frivolous. The Mullen Estate argued that there was evidence from which a finder of fact could conclude that Fr. Mullen had completed the terms of the land contract and that the Fagermans waived any claim that Fr. Mullen breached the contract by making late payments. Further, although there was evidence that Fr. Mullen purported to make an assignment to Peckham, the evidence showed that Fr. Mullen did not actually effect the assignment. For that reason, there was no assignment in breach of the land contract.[1] Given these questions of fact, the Mullen Estate maintained that it was inappropriate to grant summary disposition in favor of the Fagermans. Finally, the Mullen Estate also stated that it timely and properly responded to the Fagermans' request for admissions.

In October 2009, the probate court held a hearing on the Fagermans' motion for a change of venue. At the hearing, the Mullen Estate's lawyer admitted that its responses to the Fagermans' request for admissions were one day late due to a miscalculation. The court stated that it had seen "that on the Request for Admission." Nevertheless, the Mullen Estate did not ask the probate court to accept the responses as timely and the Fagermans did not move to have the court deem the requests admitted at this hearing. Instead, the probate court denied the motion for a change of venue and scheduled an evidentiary hearing for the Fagermans' remaining motions.

Carl Fagerman died on December 27, 2009, and Bertha Fagerman filed an answer to the Mullen Estate's complaint in March 2010.

The probate court held an evidentiary hearing on March 18, 2010. Bertha Fagerman represented herself at the hearing and appeared by phone. During the hearing, both parties submitted documents for admission and the court took testimony from Adams and Bertha Fagerman. In addition, the probate court permitted the parties to make closing statements.

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[1] The probate court entered a default judgment against Peckham in December 2009, and she is not a party to this appeal.

After the closing statements, the probate court made several findings of fact. It found that, although Bertha and Carl Fagerman were listed as the vendees on the land contract, Bertha Fagerman was not involved with the contractual dealings. Rather, Carl Fagerman "handled this business deal on behalf of both of you" and "that he was authorized to do that." It also found that the handwriting on the schedule of payments belonged to Carl Fagerman.

The probate court acknowledged that there was a significant gap in the payment history, but found that the Fagermans did not assert the default: it was "clear to me that there was that business dealing then long after a period of time that the last payment was made." The court explained that there was evidence—in the form of a letter sent to Fr. Mullen—that Carl Fagerman tried to reorder the dealings under the land contract in February 1998. And, around that time, Carl Fagerman's entry for receipt of a payment of $1,000 toward the remaining principal showed that he did in fact do so. This entry, the court found, was consistent with Carl Fagerman's notation that the parties agreed that there would be no more interest on the land contract. And, accordingly, it found that Carl Fagerman agreed "that there would be no more interest due . . . ." The court also noted that Fr. Mullen paid all the taxes on the property—even after his purported defaults—despite the fact that he was not required to do so under the land contract. From this, the court concluded that it was "extremely inequitable" and "unfair" for Bertha Fagerman to now argue that Fr. Mullen was in default before the 1998 payment. Indeed, the court specifically found that the Fagermans never took any steps to inform Fr. Mullen that his renewed payments on the land contract and his continued payment of the taxes from 1999 to present were in vain because "he had already lost the property . . . ."

The probate court ultimately found that Fr. Mullen had completed the terms of the land contract in July 1999. The court explained that, although the July 1999 check from Fr. Mullen to Carl Fagerman was for $2,000, rather than the $2,500 remaining balance, it nevertheless contained a notation that suggested that the payment was the final payment. The probate court agreed that the notation could have been more explicit, but found that—in light of the totality of the evidence—the check was actually "the final payment and that it was accepted by your husband as such." The court concluded that the Mullen Estate had proved its right to have title quieted to the property.

After making its findings of fact, the court denied the Fagermans' motions to strike, for summary disposition, and to declare the Mullen Estate's complaint to be frivolous. It then stated that it was "granting the relief requested by [the Mullen Estate] in the petition to quiet title to the property and order[ing] that a deed be made to the estate . . . ."

In April 2010, the probate court entered an order granting quiet title to the property at issue in favor of the Mullen Estate and denying the Fagermans' motions to strike the complaint, for summary disposition, and to declare the complaint to be frivolous.

This appeal followed.

II. IMPROPER FINDINGS OF FACT

A. STANDARDS OF REVIEW

Bertha Fagerman first argues that the probate court erred in making findings of fact that were contrary to the admissions made by the Mullen Estate. Specifically, she argues that, because the Mullen Estate did not timely answer the requests to admit, they were deemed admitted and, for that reason, were conclusive as to the matters admitted. This Court reviews de novo the proper interpretation and application of the court rules. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). This Court also reviews de novo a trial court's decision to deny a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). However, this Court reviews a trial court's factual findings for clear error. *Johnson Family Ltd Partnership*, 281 Mich App at 387. A finding is clearly erroneous when this Court is left with a definite and firm conviction that a mistake has been made. *Id.* This Court reviews a trial court's decision to permit extra time to reply for a request for admission for an abuse of discretion. *Janczyk v Davis*, 125 Mich App 683, 691; 337 NW2d 272 (1983).

B. REQUESTS TO ADMIT

Under Michigan's court rules, a party may serve on another party "a written request for the admission of the truth of a matter . . . stated in the request . . . ." MCR 2.312(A). A matter admitted under this rule is "conclusively established." MCR 2.312(D)(1). Once a matter is admitted, it cannot be amended or withdrawn except by motion and for good cause. *Id.* A matter is admitted when the party to whom the request was directed serves a written answer admitting the fact on the party requesting the admission. But a request can also be deemed admitted if untimely:

> Each matter as to which a request is made is deemed admitted *unless*, within 28 days after service of the request, or *within a shorter or longer time as the court may allow*, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. [MCR 2.312(B)(1) (emphasis added).]

Although the prior version of this court rule provided that a party must request additional time to serve answers by motion, see GCR 1963, 312.1 (providing 28 days to serve the answer, "or within such shorter or longer time as the court may allow on motion and notice . . . ."), the current court rule gives the trial court the discretion to provide for a longer or shorter period even in the absence of a specific request. Cf. *Jancyzk*, 125 Mich App at 687-694 (construing GCR 1963, 312.1). Moreover, the rule does not limit the timing of such an order—trial courts have the discretion to alter the time within which a party may answer a request for admission at any time and may do so even after a party has served its request for admissions. That is, the trial court has the discretion to treat otherwise untimely answers as timely. As such, although the service of an answer after the 28-day period provided under MCR 2.312(B)(1) *might* result in the requests being "deemed admitted", it does not necessarily follow that an answer served after the 28-day period is automatically deemed admitted; the trial court must resolve any disputes about the service and timing of the request before it can determine whether the answers should be

deemed admitted. See, e.g., *Johnson Family Ltd Partnership*, 281 Mich App at 388 (noting that a party cannot be faulted for failing to answer a request that was never served and asserting that the trial court is responsible for resolving disputes about the receipt of service); see also *Janczyk*, 125 Mich App at 687 (construing the predecessor to MCR 2.312 and stating that the sanctions for failing to properly respond to a request for admissions are not self-executing). Further, even if the trial court determines that the answers were not timely served and, therefore, should be deemed admitted, it still has the discretion to permit the withdrawal or amendment of the answers. See MCR 2.312(D)(1).

Here, the Fagermans served their request for admission on the Mullen Estate on June 22, 2009, and the Mullen Estate did not serve its answers until July 21, 2009. Accordingly, the Mullen Estate missed the 28-day deadline by one day. In their supplemental brief filed in September, the Fagermans noted the missed deadline and asserted that the requests were deemed admitted. Arguing in the alternative, the Fagermans also stated that, even if the court treated the answers as timely and proper, they were still entitled to have their motions granted. In response to this supplemental motion, the Mullen Estate argued that its answers were both timely and properly made. Neither party asked the court to resolve this disagreement or otherwise settle whether the requests were deemed admitted, despite the clear dispute.

At an October 2009 hearing on a different matter, the Mullen Estate's lawyer admitted that its answers to the Fagermans' request for admissions were one day late due to an apparent "miscalculation" and the probate court acknowledged as much. But the Mullen Estate did not specifically ask the court to treat the answers as having been timely made or ask the court to treat the untimely answers as an amendment under MCR 2.312(D)(1). Similarly, the Fagermans did not ask the probate court to enforce the time limit provided under the court rule and deem the requests admitted.

Several months later, the probate court held an evidentiary hearing to resolve the Fagermans' motions and determine whether the Mullen Estate was entitled to the relief requested in its complaint.[2] At the hearing, it is clear that the probate court did not consider the requests to have been deemed admitted. Rather, the court implicitly accepted the Mullen Estate's answers to the Fagermans' request for admissions. And Bertha Fagerman did not preserve her claim of error by objecting to the probate court's decision to treat the requests as though they had been timely answered. See *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008) (explaining that Michigan follows a raise or waive rule of appellate review for claims of error in

[2] The probate court appears to have combined a hearing on the Fagermans' motions with an evidentiary hearing that essentially constituted a bench trial on the merits. It is unclear whether the parties agreed to this procedure for resolving any factual disputes or whether the probate court was acting under MCR 2.116(I)(3) and (I)(5) (permitting an immediate trial to resolve disputed issues of fact after a motion for summary disposition under certain circumstances). In any event, the parties did not object and have not appealed the probate court's decision to resolve the factual disputes in this way.

civil cases). Indeed, not only did Bertha Fagerman not object to the court's acceptance of those answers, she actually asked that the court admit the answers into evidence:

> *The Court*: All right. H is admitted. So far C, F, G, and H are admitted. I, do you want that admitted, ma'am?
>
> *Ms. Fagerman*: Correct.
>
> *The Court*: Okay.
>
> *Ms. Fagerman*: Yes.
>
> *The Court*: Hang on a second. Okay, that's [the Mullen Estate's] response to [the Fagermans'] first request for admissions. They are numbered one through, I think I saw like thirty-four—thirty-six. It appears to be signed by Patricia Adams (the Mullen Estate's personal representative) and Lauren Underwood (the Mullen Estate's lawyer) dated July 21, 2009. You want that admitted. And there is a proof of service also.
>
> *Ms. Fagerman*: Yes.
>
> *The Court*: And you want that admitted?
>
> *Ms. Fagerman*: Yes.

Given that Bertha Fagerman did not object to the probate court's handling of the request for admission at the evidentiary hearing—despite the fact that it was clear that the court did not give conclusive weight to the admissions—and actually asked the court to admit and consider the answers as evidence, we conclude that, under the totality of the circumstances, she has waived this claim of error.[3] *Grant v AAA Michigan/Wisconsin, Inc*, 272 Mich App 142, 148-149; 724 NW2d 498 (2006) (stating that a party that expressly agrees with a trial court's handling of an issue waives any claim of error with regard to that handling). Accordingly, the probate court was

[3] In her reply brief on appeal, Bertha Fagerman notes that under MCR 2.312(F) a request for admissions and the answers are automatically part of the lower court record and must be considered by the trial court. However, MCR 2.312(F) is not a rule of evidence and does not mandate the admission of these documents at a trial or evidentiary hearing. Nor does this rule govern whether a request for admission should be deemed admitted. Accordingly, this rule has no bearing on whether she expressly agreed to the probate court's decision to treat the answers as though they were timely by asking that they be admitted into evidence.

not bound to make findings that were consistent with a determination that the requests had been deemed admitted and there is no error.[4]

C. LIABILITY FOR PROPERTY TAXES

Bertha Fagerman also argues that the probate court erred when it determined that the land contract was silent as to whether the vendee was responsible for the payment of the taxes on the property at issue. Because the contract provided that the Fagermans were responsible for the 1974 taxes, it logically follows that Fr. Mullen and his predecessors in interest were responsible for the taxes after 1974. Finally, because the land contract did not require the Fagermans to pay the taxes, she maintains, the court could not properly consider Fr. Mullen's payment of the taxes in determining whether Fr. Mullen completed performance under the land contract.

Bertha Fagerman misconstrues the probate court's use of the evidence that tended to suggest that Fr. Mullen paid all the taxes on the property at issue. Although the court construed the land contract to not require Fr. Mullen to pay the property taxes, a fair reading of the court's comments shows that it used the evidence that Fr. Mullen paid all the taxes as evidence that the Fagermans did not assert a self-help remedy and reclaim the property; that is, the court determined that this evidence suggested that the Fagermans did not treat Fr. Mullen as though he defaulted on the land contract. This is an entirely reasonable inference. Moreover, typically one would expect a vendor who forfeited a land contract to reclaim possession of the property and, consistent with that, begin to pay the taxes in his or her own name. Similarly, one would expect a vendee who had been ejected from the property to refuse to pay any further taxes; and one would certainly not expect a vendee who had forfeited his land contract to continue paying the tax for the vendor's benefit for some years after the default. As such, the same inference could be drawn from this evidence even if the court had interpreted the land contract to have required Fr. Mullen to pay the taxes. Consequently, the probate court's interpretation of the land contract was not essential to this finding. And, on this record, we cannot conclude that the court clearly erred when it found that the Fagermans did not assert the right to default Fr. Mullen or reclaim the property prior to his final payment in 1999.[5] *Johnson Family Ltd Partnership*, 281 Mich App at 387.

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[4] Bertha Fagerman also argues that the probate court's failure to give the "admissions their full effect" constituted a violation of due process under the United States and Michigan constitutions. Because she waived any claim of error in the court's treatment of the request for admissions, we decline to address whether a party has a constitutional right to have a trial court enforce Michigan's court rules in their preferred manner.

[5] Moreover, it is clear from the record that the probate court premised its decision to grant the Mullen Estate's request to quiet title on the fact that Fr. Mullen completed performance under the land contract with the final payment in 1999; it did not find that Fr. Mullen was entitled to a credit for his tax payments against the land contract price.

D. FORFEITURE

Bertha Fagerman argues that the probate court also clearly erred when it found that she and her husband never took any action to hold Fr. Mullen in default. Specifically, she notes that she and her husband specifically voided the land contract in their April 2009, letter to the Mullen Estate. The probate court did initially appear to find that the Fagermans had never forfeited the land contract: "I further find support for that in the fact that you and your husband did nothing throughout the entire period to alert . . . Father Mullen, that the payments that he had made through that—that date, 1999 or through this date in 2010 were in [vain]." However, a fair reading of the court's findings does not support this claim of error; it is plain that the court actually found that the Fagermans did not treat Fr. Mullen as though he were in default under the terms of the land contract prior to his final $2,000 payment in 1999, and that this evidence was consistent with its findings that Carl Fagerman waived any breach prior to 1999, waived the interest payments, and accepted the July 1999 payment as the final payment under the land contract. We conclude that this finding was not clearly erroneous.[6] *Id.*

There were no errors in the probate court's findings that warrant relief and the court properly determined that there were questions of fact that it had to resolve. Therefore, it also did not err when it denied the Fagermans' motion for summary disposition under MCR 2.116(C)(10). *Barnard Mfg*, 285 Mich App at 369.

III. FAILURE TO STATE A CLAIM

Bertha Fagerman next argues that the probate court erred when it denied her and her husband's motion for summary disposition under MCR 2.116(C)(8). Specifically, she argues that the Mullen Estate admitted that it was not in possession of the property and, accordingly, it did not have standing to maintain an action in quiet title. As noted above, the court did not err when it declined to treat the Fagermans' request for admissions as though they had been admitted. Hence, the Mullen Estate did not admit that it was not in possession of the vacant lots.

Further, Bertha Fagerman erroneously relies on MCL 600.2932(2) for the proposition that a vendee to a land contract cannot file a complaint for quiet title unless he or she is in possession of the property at issue. That statute provides that a party to a land contract cannot use quiet title to establish his or her interests in land *if* he or she could obtain relief under MCL 600.5634. Our Legislature repealed MCL 600.5634 in 1972 and replaced it with MCL 600.5714. See 1972 PA 120, § 2. MCL 600.5714 provides when a party can properly use summary

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[6] We agree that there is evidence that permitted an inference that the Fagermans told Fr. Mullen that he was in default and gave him an ultimatum to pay the full amount or lose the property. But there was also evidence that the Fagermans waived the right to strictly enforce the payment schedule, waived the interest, and accepted the last payment as the final payment under the land contract. It was for the finder of fact to resolve the discrepancies in the evidence and decide credibility, and the probate court resolved that dispute in favor of the Mullen Estate.

proceedings to recover the possession of real property and it plainly has no application to the facts of this case.

The probate court did not err in denying the Fagermans' motion for summary disposition under MCR 2.116(C)(8).

IV. MODIFICATION OF THE LAND CONTRACT

A. STANDARDS OF REVIEW

Bertha Fagerman also argues that the probate court erred when it determined that the parties had modified the terms of the land contract. Specifically, she argues that the parties could not orally modify the terms of the land contract and that, in any event, any change to the contract was not supported by consideration. She also argues that she did not authorize her husband to act on her behalf and, because the property was held by the entireties, her husband could not unilaterally modify the terms of the contract. This Court reviews de novo, as a question of law, the proper scope and application of a legal doctrine. See *Ghaffari v Turner Constr Co*, 473 Mich 16, 19, 699 NW2d 687 (2005). This Court reviews a trial court's factual findings after a bench trial for clear error. *Lignon v Detroit*, 276 Mich App 120, 124, 739 NW2d 900 (2007).

B. ANALYSIS

It is well-settled that the parties to a contract can modify or waive the terms of the agreement. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). However, a contract concerning an interest in real property must generally be in writing in order to be valid. MCL 566.106; MCL 566.108; see also *Zurcher v Herveat*, 238 Mich App 267, 299-300; 605 NW2d 329 (1999) (stating that a modification to a land contract must either be in writing and signed by the party against whom it is to be enforced or, if oral, must be supported by consideration distinct from the underlying contract). Here, there was evidence that the parties mutually agreed that Fr. Mullen would not have to pay interest from a particular date. Carl Fagerman memorialized that agreement on the schedule for the receipt of payments and initialed it. The notation and initials were sufficient to create a binding writing that modified the land contract. See *Archbold v Industrial Land Co*, 264 Mich 289, 291; 249 NW 858 (1933) (stating that a signature by initials is sufficient to meet the requirements of the statute of frauds); MCL 566.1 (stating that a modification of a contract—including a contract involving real property—does not have to have consideration in order to be valid if in writing and signed by the party against whom it is sought to enforce the change); see also *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 11; 708 NW2d 778 (2005) ("The fact that parties consider it to their advantage to modify their agreement is sufficient consideration."). Similarly, the record evidence permits a finding that Carl Fagerman acted on his own behalf and as the duly authorized agent for Bertha Fagerman. See *St. Clair School Dist v Intermediate Educ Ass'n*, 458 Mich 540, 556-557; 581 NW2d 707 (1998) (noting that the existence of an agency relationship is a question of fact if there is any evidence, direct or inferential, tending to establish it and describing the facts bearing on such a finding). Therefore, the probate court did not err when it found that the parties had mutually agreed to a binding modification concerning the interest rate.

Finally, although the evidence shows that Fr. Mullen did not pay the full amount due under the land contract, the check that he issued in July 1999 to Carl Fagerman is evidence that the parties mutually agreed to discharge the land contract for a sum less than the remaining amount due. The endorsement of a check with a notation that the check constitutes final payment under the contract can constitute a writing sufficient to meet the requirements of the statute of frauds. *Kelly-Stehney & Associates, Inc v MacDonald's Industrial Products, Inc*, 265 Mich App 105, 113; 693 NW2d 394 (2005) ("A note or memorandum may be sufficient under the statute of frauds in any number of forms, including a letter, an account statement, a draft or note, or a check."). Here, the probate court found that Carl Fagerman, acting on his own behalf and that of his wife, accepted Fr. Mullen's check for $2,000 in payment for the property and endorsed it for deposit. This check was sufficient to establish that the parties mutually agreed to waive the remaining principal balance of $500 in lieu of an upfront payment of $2,000; and to discharge Fr. Mullen's remaining obligations under the land contract. Even if this check were not a sufficient writing, our Supreme Court long ago determined that a contract that was subject to the statute of frauds could be orally released or discharged. See *Grand Traverse Fruit & Produce Exchange v Thomas Canning Co*, 200 Mich 95, 98; 166 NW 878 (1918) (stating that, notwithstanding the statute of frauds, courts will "permit testimony of subsequent oral agreements which work a release or discharge of the whole contract or obligation."). And, on this record, we cannot conclude that the probate court clearly erred when it found that the parties had mutually agreed that Fr. Mullen's prepayment of a lump sum that was $500 less than the remaining balance, rather than making monthly payments over time,[7] would discharge his remaining obligations under the land contract. *Johnson Family Ltd Partnership*, 281 Mich App at 387.

The probate court did not err when it determined that Carl Fagerman, on his own behalf and that of his wife, accepted Fr. Mullen's July 1999 check as final payment for the property at issue.

V. FRIVOLOUS COMPLAINT

Finally, Bertha Fagerman argues that the probate court erred when it determined that the Mullen Estate's complaint was not frivolous and, for that reason, denied her motion to strike the complaint and sanction the Mullen Estate. The Mullen Estate clearly sued to protect its legitimate interests in the property at issue rather than to harass, embarrass, or injure the Fagermans. Moreover, the Mullen Estate's position had an arguable factual basis and was amply supported by the law. See MCL 600.2591(3). Accordingly, the court did not err when it denied the Fagermans' motions to strike the complaint and sanction the Mullen Estate.

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[7] We also conclude that the one-time payment of $2,000—in lieu of $2,500 in payments over 25 months—constituted adequate consideration to support the modification; the Fagermans gained the time-value of the lump sum payment and Fr. Mullen saved $500 off the total purchase price.

There were no errors warranting relief.

Affirmed. As the prevailing party, the Mullen Estate may tax its costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto