STATE OF MICHIGAN

COURT OF APPEALS

CHARLES T. MILLER, JR.,

Plaintiff/Counter Defendant-Appellee,

V

KENNETH R. KERR, FAY M. KERR, JAMES P. KERR, PAUL KERR, I, CHARLES MILLER, III, TONY LEE MILLER, MICHAEL KERR, MICHAEL KERR, JR., and PATRICK E. KERR, JR.,

Defendants/Cross Defendants,

and

DAVID E. KERR, II, DANNY D. KERR, RODNEY KERR, and JEFF KERR,

Defendants/Counter Plaintiffs/Cross Plaintiffs-Appellants.

UNPUBLISHED
October 25, 2011

No. 299289
Presque Isle Circuit Court
LC No. 08-002857-CK

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendants, David E. Kerr II, Danny D. Kerr, Rodney Kerr, and Jeff Kerr, appeal as of right from an order granting plaintiff Charles T. Miller Jr. summary disposition in Miller's action to quiet title to two parcels of land in favor of himself and defendant Kenneth Kerr.[1] The trial court granted Miller's motion, finding that defendants' claim to the parcels was barred by the statute of frauds. We reverse.

I. BASIC FACTS

[1] All of the other defendants consented to the requested relief.

At issue in this case is the ownership interest in two contiguous parcels of land. In 1984, the parties, many of whom were family members or close friends, formed an informal "hunting club" and wanted to purchase property that could be used by each of the various members. The first 80-acre parcel was purchased in 1983. Plaintiff and Kenneth Kerr, longtime friends, signed a land contract to purchase the property. Kenneth was the treasurer of the hunting club and had the responsibility of collecting money from the members for the purchase and for property taxes. The property was paid off in 1988. It was deeded in Kenneth's name, though both his name and plaintiff's appeared on the land contract agreement. In 2009, a quit claim deed was recorded that conveyed the 80-acre parcel to Kenneth and plaintiff as joint tenants with rights of survivorship.

In 1989, plaintiff and Kenneth negotiated for the purchase of three tracts of land adjacent to the already-existing 80 acres. The three parcels added an additional 94[2] acres to the hunting property. The parties borrowed $35,000 from Delores Kerr, mother to David and Danny Kerr, to pay off the land contract. Although the parties believed that a warranty deed conveying interest in the property to the hunting club members had been filed, it had not. The loan to Delores Kerr was paid off in 2002.

While the parties amicably used the parcels for a number of years, a problem developed with David and Danny Kerr. Members complained that the two had become territorial over a portion of the 94-acre parcel. In 2001 Kenneth realized that he had not been receiving property tax statements about two of the parcels comprising the 94-acre tract. Being the treasurer of the club, he investigated the matter and discovered that David and Danny filed quit claim deeds on the two parcels. Kenneth realized that he had been duped by the two men. In 2000, David and Danny asked Kenneth and his wife to sign forms that they represented were necessary to allow them to look at property records. Little did Kenneth know that these signatures would be used to create fraudulent quit claim deeds. In 2003, Kenneth, plaintiff, and other members of the hunting club filed suit to quiet title against David and Danny, as well as two other members of the hunting club in Bay County (03-3856-CZ). Kenneth offered to prepare a quit claim deed, conveying an interest in the property to multiple parties as tenants in common. Defendants, believing that the property was owned as joint tenants with rights of survivorship, rejected the deed. A default judgment was entered against David and Danny on March 16, 2004, declaring their two quit claim deeds void. It was only after the 2003 lawsuit that Kenneth discovered that the warranty deed on the 94-acre tract had never been filed.

David and Danny were thereafter barred from entering the property by members of the club. The two of them filed a lawsuit (04-3850-CZ-S), seeking a declaration that they were co-owners of the property. The suit was dismissed by stipulation of the parties.[3]

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[2] The parties and the trial court refer to this parcel as being 94 acres while the land contract state that it is 92 acres.

[3] The stipulation of dismissal is not contained in the lower court record. It is unclear whether the suit was dismissed with or without prejudice.

In 2008, plaintiff instituted the instant lawsuit against numerous defendants, seeking to have title to both the 80- and 94-acre parcels quieted in his favor as a tenant in common with Kenneth. Alternatively, plaintiff sought to impose a constructive trust on the property for use as a hunting club. For the first time, plaintiff alleged that the hunting club members did not share an ownership interest in the property; rather, the money paid by various members were fees for the right to use the property as hunting grounds. Four of the defendants, the instant appellants, filed an answer as well as a counter claim and cross claims to quiet title and for an accounting. Defendants believed that the property was purchased jointly, with Kenneth acting as an agent for the remaining hunting club members, and that the hunting members collectively owned by the members as joint tenants with the rights of survivorship.

II. MOTION FOR SUMMARY DISPOSITION

Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Plaintiff argued that defendants not only had no ownership interest in the land, but that there was no evidence that a hunting club was ever formed or that the club members had any right to use the property. Plaintiff maintained that defendants' claim was defeated by the statute of frauds because there was nothing in writing conveying any interest in the property. Plaintiff argued that partial performance, an exception to the statute of frauds, did not apply because defendants could not show that their payments were for anything other than the use of the property. Similarly, an interest in land could not be created by estoppel. Plaintiff believed that even if he took a contrary position in the prior lawsuits, there was nothing that waived or excused compliance with the statute of frauds.

In response, defendants argued that there were a number of issues of fact precluding summary disposition regarding the collective intentions of the parties. In support of their brief, defendants included Kenneth's deposition testimony from one of the earlier lawsuits, wherein Kenneth testified that the property was bought and owned by each of the members of the hunting club. Kenneth admitted that he kept a ledger for each member, noting the amount of their contributions. Throughout his deposition testimony, Kenneth indicated that the property was jointly owned. Defendants also referred to the 1989 deed for the 92-acre parcel that was never recorded. The deed clearly granted an interest to defendants. The fact that the deed contravened the purchase agreement (which contained only plaintiff's and Kenneth's names) was of no moment, especially when the mother of two of the defendants provided $35,000 in paying off the loan. Defendants also referenced the pleadings filed in the earlier lawsuits, which clearly supported a finding that everyone agreed and understood that the property would be jointly owned. Defendants argued that their claims were not barred by the statute of frauds because there were numerous facts to show the existence of a collective agreement and also part performance. Though plaintiff argued that the payments were dues, the amount paid was grossly disproportionate for the right to hunt on the property two weeks a year. Even in the absence of a written instrument, principles of equity removed this case from the statute of frauds.

After hearing oral arguments, the trial court issued a written opinion and order granting plaintiff summary disposition pursuant to MCR 2.116(C)(7). Though plaintiff had moved for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), the legal argument rested with the statute of frauds and the motion was more appropriately considered pursuant to MCR 2.116(C)(7). The trial court found that "there was never any meeting of the minds essential to

formation of a contract." While it was clear that the land was acquired "with the idea that it would be enjoyed by extended family[,] . . . the fact that family members were required to pay for the privilege of using the land (subject to "rules") does not create in them a proprietary interest." The trial court believed that both plaintiff and Kenneth paid a disproportionate share toward purchasing the property. The trial court reviewed the pleadings in the prior lawsuits and "considering the context of the earlier matters, there is nothing that has been identified therein that shows the existence of an oral agreement." The trial court concluded:

> Review of this record shows that the Counter-Plaintiffs paid reasonable sums of money in return for which they had the benefit of utilizing the property for hunting. Now they ask for more, but even if the Court were to accept their argument that the sums paid were for purchase instead of just occasional use of the land, yet even then there is no showing nor offer of proof that they exerted authority over the land (actually, on this point the proofs are to the contrary), improved the land, or that any of the other requirements for part performance are satisfied.

Defendants now appeal as of right.

III. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, ___Mich ____; ___ NW2d ____, issued June 6, 2011 (Docket No. 141168), slip op at 2; *In re Egbert R Smith Trust*, 480 Mich 19, 23; 745 NW2d 754 (2008). Under MCR 2.116(C)(7), an order granting a motion for summary disposition is proper when a claim is "barred because of ... the statute of frauds." A motion under MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence, provided the evidence is substantively admissible. MCR 2.116(G)(6); *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). All well-pleaded factual allegations are accepted as true and construed in favor of the nonmoving party, unless contradicted by the admissible evidence. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 278; 769 NW2d 234 (2009); *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). If there is no genuine issue of material facts, or reasonable minds could not differ with respect to the effect of the facts, whether a claim is barred may be decided as a question of law. *Willett*, 271 Mich App at 45.

IV. ANALYSIS

MCL 566.106 provides:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

On appeal, defendants argue that the "trial court clearly erred in failing to address the multiple recognized exceptions to the rule."

MCL 566.107 further provides that "[t]he preceding section shall not be construed . . . to prevent any trust from arising, or being extinguished, by implication or operation of law." Citing *Stephenson v Golden*, 279 Mich 710; 276 NW2d 849 (1937), defendants maintain that Kenneth purchased the property for the benefit of the hunting club members and, therefore, held the property in trust. "Where a person acquires the legal estate in property as the agent of another, or upon trust and confidence that he will acquire it for the benefit of another, equity will imply a trust in favor of the latter." *Stephenson*, 279 Mich at 742.

Defendants also argue that Kenneth acted fraudulently when he represented to the hunting club members that they would share an ownership interest in the land, inducing them to pay their portion of the purchase fee and then subsequently denying the members their interest. The statute of frauds was "never intended to legalize proceedings for the benefit of a grantor in fraud of other; and it has no application to a case where one has taken a deed in his own name in fraud of the rights of another." *Trippensee v Rice*, 312 Mich 233, 236-237; 20 NW2d 172 (1945). The basic elements of fraud are: (1) a material representation; (2) the representation was false; (3) knowledge that the representation was false; (4) intent to induce another to rely on the representation; (5) reliance on the representation; and (6) injury as a result of such reliance. *Hord v Environmental Research Institute of Mich (After Remand)*, 463 Mich 399, 404; 617 NW2d 543 (2000); *Custom Data Solutions, Inc v Preferred Capital, Inc*, 274 Mich App 239, 243; 733 NW2d 102 (2006).

Initially, we reject plaintiff's contention that defendants' allegations of fraud have not been preserved for appellate review. Plaintiff brought suit to quiet title and moved for summary disposition based on the fact that the statute of frauds barred any potential oral agreements from granting interests to persons not listed on the deed. In so doing, plaintiff effectively placed the application of the statute of frauds, as well as relevant exceptions thereto, into issue.

We conclude that there were genuine issues of material fact and that the trial court erred in granting plaintiff's motion for summary disposition particularly considering the conflicting deposition testimony and pleadings from the prior two law suits. "Judicial estoppel prevents a party from taking a position in a later proceeding that is inconsistent with a position that the party took successfully in a prior proceeding." *Dykema Gossett, PLLC v Ajluni*, 273 Mich App 1, 16; 730 NW2d 29 (2006), vacated in part on other grounds 480 Mich. 913 (2007). It is an equitable doctrine that is applied at the discretion of the court based on the facts of each individual case. *Opland v Kiesgan*, 234 Mich App 352, 365–366; 594 NW2d 505 (1999).

When Kenneth, plaintiff, and the other hunting club members sued defendants to set aside fraudulently-obtained quit claim deeds in the 2003 (03-3856-CZ), the complaint contained the following allegations:

> 17. That in order to have access and use of this property, each of the Kerr family members and Miller family members who were members of the hunting club would contribute a sum certain for the purchase of said property.

18. That it was always intended that this property would be owned, used, maintained and inherited by the hunting club members consisting of Kenneth R. Kerr and Charles T. Miller and their families.

19. That it was agreed that some of the hunting club members would pay a lesser amount than others for this property due to their young age, their attendance in school, their poor health, etc,…

20. That some of the hunting club members temporarily assumed payments on behalf of others because of age, health, etc,…, so that a sick and/or young family member could still enjoy ownership rights to the said property.

21. That Plaintiff Kenneth Kerr had the responsibility of collecting monies from the hunting club members to pay off the 80 acres.

22. That Plaintiff Kenneth Kerr also had the responsibility of collecting monies to pay the property taxes on the hunting property.

23. That this joint agreement to purchase, to own, to use, and to maintain this property for hunting constituted an implied contract amongst members of the hunting club.

24. That this joint enterprise which resulted in the formation of the 32-40 Hunting Club to purchase, maintain, use, and operate a hunting club on this property constituted a de facto partnership in which all the members had a fiduciary duty to the other.

25. That a warranty deed was filed with the Presque Isle County Register of Deed was filed [sic] on or about February 18, 1989 and it was agreed that this property would be conveyed to Kenneth Kerr, the oldest member of the hunting club.

26. That once again, on or about November 1988, the parties, namely Plaintiff Kenneth R. Kerr and Plaintiff Charles T. Miller, Jr., engaged in negotiations with Parker Land Corporation in Presque Isle County to purchase an additional three adjacent parcels of property. Altogether these three parcels consisted of 94 acres. Individually the three parcels consisted of two 40 acre parcels and one 14 acre parcel.

27. That a land contract for the sale of this 94 acre property was signed on November 17th 1988 between Parker Land Corporation, seller, to Charles T. Miller and Kenneth R. Kerr, purchasers.

28. That once again, the parties made payments toward the purchase of the three parcels of land by paying monthly sums of money to the Plaintiff Kenneth Kerr, who then, forwarded the same to the Parker Land Corporation.

29. That as with the previously purchased property, the parties agreed amongst themselves again that the property would be used, maintained, and be made available to all members of the hunting club.

30. That on or about 1989, the three parcels of Presque Isle hunting property were paid in full to the Parker Land Corporation as a result of borrowing $35,000 from the Defendants David and Danny Kerr's mother, Dolores Kerr. That this $35,000 was paid off on or about April 1, 2001.

31. That upon information and belief, a warranty deed dated November 13, 1989 in regard to the three Presque Isle parcels was supposed to filed with Presque Isle Register of Deeds and that this warranty deed conveyed the property to Charles T. Miller, Jr., Kenneth R. Kerr, Patrick E. Kerr, Jr., Paul I. Kerr, David E. Kerr, II, Danny D. Kerr, and Jeff Kerr, jointly.

* * *

60. That on or about January 2002, after researching the records at the Presque Isle Register of Deeds, the Plaintiff Kenneth Kerr and Plaintiff Michael Kerr discovered that the November 13, 1989 warrant[y] deed conveying ownership of the 94 acres to various members of the hunting club by way of a joint tenancy had never been filed.

In alleging breach of implied contract and breach of fiduciary duties, the plaintiffs alleged:

71. The hunting club members made an agreement amongst themselves in 1986 and again in 1989 to purchase, own, maintain, and make available to each other the entire 174 acres.

125. That if the property is reconveyed to the Plaintiff Kenneth Kerr, then, a subsequent deed/s can be drafted so that the property can be conveyed so that all purchasers of the property will have ownership rights through a tenancy in common with rights of survivorship so that the property can be owned in the manner the parties originally intended.

Plaintiffs' brief in support of the motion for default judgment in that case is similarly replete with references to the parties' agreement to own the parcels jointly as members of the hunting club:

Plaintiffs request that this Court impose a constructive trust in regard to the hunting property in question and by way of this trust, issue and order that a quit claim deed be filed in which the property would be owned by the parties as tenants in common with rights of survivorship, which is consistent with the original intent of the parties at the time this property was purchased.

* * *

> The intent of the parties was that they and their families would purchase and maintain this 80 acres as hunting property for the[m]selves and their heirs. No one would exclusively own any acreage. Instead, all of the parties and their families would have equal access to all of this property and everyone would pay a monthly amount towards the purchase of this property.
>
> * * *
>
> The Plaintiff Kenneth Kerr was the treasurer of the hunting club. He had the obligation of collecting money to pay for the land purchase. He also had the obligation of collecting money to pay for property taxes.
>
> * * *
>
> The Plaintiffs want to end this ordeal. They are requesting a ruling from this Court that the property in question be reverted back to the Plaintiff Kenneth Kerr and a deed drafted which would make the parties tenants in common. Already the Plaintiff Kenneth Kerr has signed a deed so that the first 80 acres is now owned by the hunting club members as tenants in common. The Plaintiffs are also requesting that this Court exercise its equitable powers and order these Defendants banished from the hunting club membership and Presque Isle hunting property. Naturally, these Defendants would be compensated for the monies they contributed in paying for this hunting property.
>
> * * *
>
> [Alternatively], [i]n the present case, a constructive trust would be appropriate. If the Court was inclined to grant such relief, Plaintiffs would request by way of a constructive trust that the Court order the property to be owned by the hunting club members as tenants in common with rights of survivorship, which is the property ownership arrangement they intended at the time this hunting club was formed and when they subsequently purchased parcels of the hunting club property.

Kenneth provided deposition testimony in the second lawsuit in 2004 (04-3850-CZ-S) wherein he clearly acknowledged that an agreement existed to own the parcels jointly:

> *Q.* Okay. How was it purchased?
>
> *A.* First we bought an 80.
>
> *Q.* Okay. Who is we?
>
> *A.* Members of the 3240 Club.
>
> * * *
>
> *Q.* Okay. But all of you purchased it?

A. Yup.

Q. Okay. And whose name was the deed put in?

A. Mine.

Q. Only, is that correct?

A. For the 80 right now.

Q. For the 80. Well, when you bought it, it was put into your name only, or were there some other people's names on it?

A. We added a sheet attached on the back with other names on it and the heading on it was in my name.

* * *

Q. [M] understanding is, is that the whole group of you got together and decided to buy this 80 acres?

A. Right.

Q. So when you decided to do it there must have been some agreement between the parties as to what was going to happen with that land in the future. So what was the agreement of the parties?

A. Word of mouth was about it at that time.

Q. Okay. Let me try and help then. How about payment; did you decide who was – how much you were going to – who was going to throw what money in?

A. Yeah.

Kenneth testified that a land contract agreement was executed and the men paid based on their age and ability.

Q. And then payments were made on that land contract out of the money that everyone was throwing in every month?

A. Yup.

Timber from the land was sold, which allowed them to pay off the contract in 1988 after only four years.

A year later, the membership purchased the adjacent property, again on land contract.

Q. Okay. In whose name was the land contract in?

A. There were a whole bunch of names on it.

Kenneth kept a set of books to keep track of payments.

Q. When did you pay off the land – have you paid off the land contract on the 92 acres? Is it paid for?

A. Yes.

Q. And when did that occur?

A. 19 – or 2002, I think.

Q. So you entered into it in '89 and then it took years but you got it paid off?

A. Yes.

Q. And that money came from the payments that came in to you?

A. From all the guys, yup.

Q. And you have recorded every single one of those payments in this book?

A. It's in the book.

* * *

Q. On the 80-acre parcel whose name exactly is that deeded in, do you know?

A. No, I haven't looked at that in a long time. I do not recall who the heck's names are on there.

Q. Is it deeded in your name solely, or are there other names on it?

A. It could be deeded in mine. I don't know because I haven't looked at it in a long time. I'd have to go home and look for it.

Q. Okay. The 92 acres, this is the deed that's only a couple years old, is that – do you know whose name that deed is in?

A. Oh, boy. For me to name them all that's on there, I couldn't – I can't do it.

Q. So you think there's a lot of people's names on that deed?

A. Yes.

The foregoing pleadings and testimony demonstrate, at the very least, a question of fact as to whether an agreement existed between the parties and whether there was part performance of that agreement. If so, then an exception to the statute of frauds exists. Additionally, there is also evidence creating an issue of fact as to whether an agency relationship existed and that the parcels were held in trust for the hunting club members. Whether an agreement existed between the parties, as well as the nature of the estate, are issues that the trial court must address.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly