IN THE COURT OF APPEALS OF IOWA

No. 8-350 / 97-1416
Filed September 30, 1998

IN RE THE ESTATE OF KENNETH E. KUPKE

THOMAS E. KUPKE,
Appellant,

vs.

BRYAN BOYD and LAURA JANE KUPKE,
Appellees.

Appeal from the Iowa District Court for Boone County, Carl E. Peterson, Judge.

Thomas Kupke appeals from the grant of the defendants' motion for summary judgment. **AFFIRMED.**

Alexander R. Rhoads and Robert K. DuPuy of LaMarca & Landry, P.C., West Des Moines, for appellant.

Bruce L. Anderson of Quinn, Doran & Anderson, Boone, for appellees.

Heard by Sackett, P.J., and Huitink and Mahan, JJ.

HUITINK, J.

This appeal involves the breach of an alleged oral agreement to convey three parcels of land by testamentary devise. We hold the alleged agreement to be within the statute of frauds, Iowa Code section 622.32(3) (1985), and not falling within any exception recognized in Iowa Code section 622.33. We therefore affirm the district court.

I. Background Facts and Proceedings.

Thomas Kupke sued the Kenneth Kupke estate for breach of an oral agreement to make specific testamentary transfers in a will. Thomas alleged Kenneth, his father and mortgagee, agreed, in exchange for deeds in lieu of foreclosure and other personal property to return the deeded real estate and personalty to Thomas by specific devise and bequest in Kenneth's will.

The estate denied Kenneth contracted with Thomas to make a will including such provisions. In its motion for summary judgment, the estate sought judgment as a matter of law arguing the statute of frauds precluded proof of the alleged oral contract by parol evidence. Thomas resisted citing the estate's tacit admission of the contract by raising this issue, his part performance of the contract, and Kenneth's possession of the deeded real estate as recognized exceptions to the exclusionary provisions of the statute of frauds.

The district court rejected Thomas' tacit admission theory stating:

> The Defendants may properly deny the existence of a contract and at the same time assert that the nature of the attempted proof by the Plaintiff of the existence of such a contract is in violation of the Statute of Frauds.

Thomas's part performance and possession theories of exception were also rejected because the district court determined neither referred exclusively or unequivocally to the alleged contract.

In the same ruling, the district court denied Thomas's motion to amend his petition by adding additional theories of recovery against one of the executors.

On appeal, Thomas argues proof of his contract with Kenneth is not precluded by the statute of frauds and it was error for the district court to conclude otherwise. He also argues denial of his motion to amend was an abuse of discretion.

II. Standard of Review.

We review an order of summary judgment for correction of errors at law. *Gabrilson v. Flynn*, 554 N.W.2d 267, 270 (Iowa 1996). The movant must show there is no genuine issue of material fact and he is entitled to judgment as a matter of law. Iowa R. Civ. P. 237(c). In reviewing the record, we consider the evidence in the light most favorable to the party opposing the motion for summary judgment. *C-Thru Container Corp. v. Midland Mfg. Co.*, 533 N.W.2d 542, 544 (Iowa 1995). In this sense, we review the record as we would on a motion for directed verdict, with the nonmoving party entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can

differ on how the issue should be resolved. *Schermer v. Muller*, 380 N.W.2d 684, 687 (Iowa 1986).

III. The Merits.

Contracts to convey an interest in land fall within the statute of frauds. Iowa Code § 622.32(3); *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 630 (Iowa 1996). Because the contract at issue would convey an interest in land, the statute of frauds applies. *Davis v. Davis,* 156 N.W.2d 870, 876, 261 Iowa 992, 1002, (Iowa 1968). The statute provides that no evidence of such a contract is competent unless there is a written memorandum signed by the party to be charged or a recognized exception to the statute applies. *See* Iowa Code § 622.32(3). The statute is not a substantive rule of law forbidding oral contracts. It is a rule of evidence limiting the manner of proving a contract within its provision. *Davis v. Roberts*, 563 N.W.2d 16, 20 (Iowa App. 1997)(citing *In re Lindsey's Estate*, 254 Iowa 699, 710-11, 118 N.W.2d 598, 605 (1962)). In the absence of a recognized exception, an oral contract to create an interest in land is unprovable. *See Meylor v. Brown*, 281 N.W.2d 632, 634 (Iowa 1979).

A. Statutory Exceptions.

Appellant contends the "purchase money" and "possession" statutory exceptions to the statute of frauds are applicable here. *See* Iowa Code § 622.33. We disagree.

Proof of an oral contract is permitted if some or all of the "purchase money" has been paid. *Id.* The words "purchase money" mean consideration received in whatever form it may exist. *Williams v. Chapman*, 242 Iowa 294, 311, 46 N.W.2d 56, 65 (1951). This exception to the statute of frauds is commonly referred to as part performance. *Davis v. Roberts*, 563 N.W.2d at 20.

Part performance will remove a real estate contract from the statute of frauds only when the acts constituting partial performance are referable exclusively and unequivocally to the contract. *Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405, 409 (Iowa 1997). We have said if the acts claimed as part performance can be explained without reference to the alleged oral contract, they do not take the contract out of the statute of frauds. *Davis v. Davis*, 156 N.W.2d 870, 877, 261 Iowa 992, 1003 (Iowa 1968). Appellant urges us to abandon the well-established "referable to the contract" analysis and to adopt the "modern" reliance standard for part performance. We decline to do so.

We are unable to find Thomas Kupke's conveyance of the three aforementioned parcels of land referred exclusively and unequivocally to a contract to reconvey the land back to him testamentary via Kenneth Kupke's will. Thomas's act of transferring the parcels to his father can be readily explained without reference to the alleged oral agreement. The deeds involved here were deeds given in lieu of foreclosure. In exchange for his transferring the three parcels of land and the items of family jewelry, Thomas Kupke's indebtedness to his father was forgiven.

Because the acts of Thomas Kupke can be explained without reference to the alleged oral agreement, we find the purchase money exception to the statute of frauds is inapplicable.

Appellant's assertion of the "possession" exception fails for the same reason as the purchase-money exception. We find Kenneth Kupke's possession of the three parcels of land did not exclusively referred to the alleged oral contract. *See Brandt v. Schucha*, 96 N.W.2d 179, 186 (Iowa 1959)(finding plaintiff's possession existed pursuant to separate lease agreement). *See also Peddicord v. Peddicord*, 47 N.W.2d 264, 267, 242 Iowa 555, 559 (Iowa 1951). The district court properly noted Kenneth Kupke held a one-half interest in two of the three parcels of land prior to the alleged oral contract. He clearly had a present right of possession irrespective of the effect of the alleged oral contract. In the third parcel of land, we find his possession is explainable outside the existence of the oral contract to reconvey. Specifically, Kenneth Kupke's possession can be readily explained by the existing debtor-creditor relationship between he and Thomas Kupke. Kenneth Kupke's possession of the third parcel of land is equally referable to the deed in lieu of foreclosure and forgiveness of Thomas Kupke's indebtedness.

B. Common Law Exceptions.

Thomas Kupke also argues the alleged oral contract falls within the "doctrine of full performance," and "admission by opponent," common law exceptions to the statute of frauds. Our review of the record indicates these issues were not adequately

developed before the district court. The extent of the appellant's argument on these issues was that the appellee "tacitly admitted" the existence of an oral contract in raising the statute of frauds. Appellant contends by moving for summary judgment on the basis of the statute of frauds, appellees admitted the existence of an oral contract, but were actually arguing the statute simply prevented parol evidence of the contract. We find this position to be wholly without merit. Because these issues were not fully presented to the district court, we decline to review them on appeal.

C. Family Jewelry.

Appellant contends the statute of frauds is inapplicable to the alleged oral contract to the extent it refers to the items of family jewelry. Our review of the record finds no reference to any argument as to the statute's applicability to the items of jewelry. As this argument was not made to the district court, we decline to address it on appeal.

IV. Conclusion.

Because the alleged oral contract is within the statute of frauds and does not fall within any recognized exception, we find the district court properly granted summary judgment. Since summary judgment is proper, we do not address the issue of merger or the district court's denial of appellant's motion to amend.

AFFIRMED.