

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
HIGHLAND COUNTY

Daryl W. Bumgarner, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 09CA22
v.	:	
Deborah E. Bumgarner,	:	<u>DECISION AND</u>
Defendant-Appellee.	:	<u>JUDGMENT ENTRY</u>
	:	Released 4/12/10

APPEARANCES:

Susan L. Davis, Hillsboro, Ohio, for appellants.

Fred J. Beery, Hillsboro, Ohio, and Forrest F. Beery, Hillsboro, Ohio, for appellee.

Harsha, J.

{¶1} In 2007, appellants Daryl and his wife, Tammy Bumgarner filed a lawsuit in the Highland County Court of Common Pleas against appellee Deborah Bumgarner (Daryl's stepmother), who they alleged owed them rents. The lawsuit concerned a mobile home and a one acre lot, which Deborah and her late husband Richard (Daryl's father) purchased in 1999. In 2000 Deborah and Richard transferred title to the land and mobile home to Daryl and Tammy, but continued to live on the property.

{¶2} Deborah counterclaimed and argued that Daryl and Tammy were in breach of an oral agreement to reconvey the property to her and Richard. After a bench trial, the court found that Daryl and Tammy had indeed agreed to reconvey the property and ordered specific performance of the agreement. Daryl has now appealed.

{¶3} First, Daryl claims that the court erred in finding clear and convincing evidence of an oral agreement to reconvey the property. However, the record contains

evidence supporting the trial court's decision. Deborah offered several witnesses that backed up her story that there was an oral agreement to reconvey the property after a situation in Florida "resolved itself." Moreover, the trial court was free to accept Deborah's explanation rather than Daryl's claim that the initial conveyance was a gift.

{¶4} Second, Daryl claims that the court relied on sympathy for Deborah instead of a legal or factual basis to take the oral agreement out of the Statute of Frauds. But as Deborah points out, the trial court found facts constituting acts of part performance -- a doctrine that permitted the trial court to remove the oral agreement from the Statute of Frauds. And although we have some reservations concerning Deborah's and Richard's apparent attempt to use Daryl and Tammy as "straw men," we hold that no abuse of discretion occurred.

I. Statement of Facts

{¶5} In 1999 Deborah and Richard decided to move from their home in Florida to Hillsboro, Ohio where they purchased a one acre lot and a mobile home. They leased their home in Florida but the renters stopped paying rent soon after Deborah and Richard moved to Hillsboro. Deborah and Richard could not afford the mortgage on the Florida home, so they stopped making payments. This caused foreclosure proceedings against the home.

{¶6} In 2000 Deborah and Richard took Daryl and Tammy to the office of a Hillsboro attorney who prepared a deed transferring the one acre lot to the younger couple. While there, Deborah and Richard also transferred the certificate of title on their mobile home to Daryl and Tammy.

{¶7} Afterwards Richard and Deborah continued to live in the mobile home and pay both the real estate and personal property taxes. They also made some improvements, including building a garage, replacing floors, and tree trimming and removal.

{¶8} In 2003 the Florida home was sold at a foreclosure auction. After Richard died in July of 2004, Deborah continued to live in the mobile home until August 2006 when she moved out and put a renter in the property. She rented the trailer for \$400.00 and received approximately two years worth of rent up until the time of trial.

{¶9} Daryl filed suit in 2007, asking for monetary damages, i.e., the rents collected by Deborah. Deborah counterclaimed, contending that Daryl and Tammy were in breach of an oral agreement to reconvey the property to her. Deborah asked for specific performance of the alleged oral agreement.

{¶10} At a trial to the court, both Daryl and Tammy testified that the conveyance of the land and mobile home was a gift. They claimed that there was no agreement to reconvey the property whatsoever. Daryl said that he let Deborah and Richard live in the mobile home for free and “[t]he deal was that they would pay the taxes on it until they, unless he couldn’t afford it or something then I would take care of it.” Daryl claimed he was unaware of any situation in Florida until this lawsuit occurred. Daryl also claimed that he paid taxes on the land after Richard died in 2004, but did not pay taxes on the mobile home because he stopped receiving notices.

{¶11} Deborah testified that “we were afraid that during the process of the foreclosure on the home in Florida that we might lose our property here in Hillsboro. That is why we signed it over to Tammy and Daryl.” Deborah claimed that Daryl and

Tammy were aware of this and that she and Richard discussed it with them prior to transferring the land and mobile home. Deborah also stated that she and Richard made no similar lifetime gifts to any of their other children, including the child that she and Richard had together.

{¶12} Deborah further claimed that at Richard's funeral she had a conversation with Daryl concerning the land and mobile home. She testified that Daryl told her "that as soon as everything calmed down and everything was settled him and Tammy were going to sign the property back over to me, that it was mine." Deborah claimed that this conversation was witnessed by Janet Reed (Deborah's mother) and Anita Richards. Janet Reed testified at trial and confirmed that she heard this conversation.

{¶13} Dennis Reed (Janet's husband and Deborah's step-father) testified on Deborah's behalf and recounted a conversation with Richard after Thanksgiving dinner in 2003. Dennis said that Richard was concerned about his own health and told him that he wanted to get the property put back into his name.

{¶14} The court also considered the deposition testimony of Ella Mae Hixon, the elder Bumgarner's next door neighbor, who was unavailable for trial because she was in a nursing home. She said that Richard told her that after the property in Florida was "settled," he and Deborah were going to have the Hillsboro property put back in their names. Hixon also said that after Richard died, Daryl came to her house to borrow tools from her son's vehicle. There, Daryl allegedly told her that he was going to put the property into Deborah's name but that he was afraid that she would mortgage it or sell it to help Timmy Bumgarner (Deborah's and Richard's natural son) "out of trouble."

{¶15} The court issued its decision finding clear and convincing evidence of an oral contract to reconvey the property. The court exercised its equitable powers and removed the oral agreement from the Statute of Frauds based on acts of part performance of the agreement by Deborah and Richard. Daryl and Tammy now appeal.

II. Assignments of Error:

{¶16} Daryl presents the following errors:

{¶17} Assignment of Error 1. The lower court erred to the detriment of Appellants by failing to apply and follow the Statute of Frauds, §1335.05 of the ORC when making its decision.

{¶18} Assignment of Error 2. The lower court erred to the detriment of Appellants by stating in its decision that the Statute of Frauds would not apply in this case claiming to apply equitable principals and ignoring the plain mandates of the ORC §1335.05, §5301.52 and §5301.51.

III. Disposition

{¶19} Daryl presents two assignments of error but essentially makes the same arguments in each one: (1) that the trial court erred in finding clear and convincing evidence of an oral contract to convey the land from Daryl to Deborah; and (2) that the trial court relied on sympathy rather than a legal or factual basis in removing the oral contract from the Statute of Frauds. For purposes of our review we merge both assignments of error and will address each argument in turn.

A. Evidence of an Oral Contract

{¶20} The burden of proof on one seeking to enforce an oral contract requires that party to prove the existence of the contract by clear and convincing evidence.

Nofzinger v. Blood, Huron App. No. H-02-014, 2003-Ohio-1406, at ¶53, citing *Geiger v. Geiger* (Nov. 16, 1993), Montgomery App. No. 13841, 1993 WL 476247, and *Tier v. Singrey*, (1951), 154 Ohio St. 521, 529, 97 N.E.2d 20. “Clear and convincing evidence” is evidence that will produce in the fact-finder's mind a firm belief or conviction as to the facts sought to be established. *State v. Eppinger*, 91 Ohio St.3d 158, 164, 2001-Ohio-247, 743 N.E.2d 881; *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54. It is considered a higher degree of proof than a “preponderance of the evidence,” the standard generally utilized in civil cases, but it is less stringent than the “beyond a reasonable doubt” standard used in criminal trials. *Schiebel* at 74.

{¶21} “Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof.” *Id.*, citing *Ford v. Osborne* (1887), 45 Ohio St. 1, 12 N.E. 526, at paragraph two of the syllabus. “However, it is also firmly established that judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court. An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial court judge.” *Id.* citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273; *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. Under this standard of review, a reviewing court does not decide whether it would have come to the same conclusion as the trial court. “Rather, we are required to uphold the judgment so long as the record, as a whole, contains some evidence from which the trier of fact could have reached its

ultimate factual conclusions.” *Bugg v. Fancher*, Highland App. No. 06CA12, 2007-Ohio-2019, at ¶9; see, also, *Seasons Coal Co.*

{¶22} Daryl argues that the trial court erred in finding clear and convincing evidence of an oral contract between Daryl and Deborah. He argues that the trial court failed to consider his testimonial evidence that: (1) he allowed Richard and Deborah to reside on the property for free; (2) he was never placed into a “position of trust” with respect to the property; and (3) he was unaware of any “situation in Florida” (allegedly Deborah and Richard’s sole reason for transferring the property.) Daryl also claims that the testimony of Deborah’s witnesses, who stated that they overheard Daryl say he was going to reconvey the property, “should not be clear and convincing” without explaining why this testimony should be disregarded.

{¶23} Deborah testified that during the process of the foreclosure on their Florida home, she and Richard became concerned that they would lose their property in Hillsboro. They made an agreement with Daryl and Tammy to deed them the property until the foreclosure was resolved. Deborah supported this testimony by offering the corroborating testimony of Janet Reed, Dennis Reed, and Hixon. These witnesses only offered circumstantial proof of the existence of the oral agreement. Nonetheless, the trial court was free to believe that Deborah’s explanation for the transfer seemed more plausible than Daryl’s explanation. The trial court could reasonably conclude it was unlikely that Deborah and Richard would give Daryl and Tammy the property as a gift, one year after they moved in, yet continue living on the property. Moreover, Deborah testified that she made no similar “gifts” to her other children, which the court could consider as weighing heavily against the gift explanation.

{¶24} Contrary to Daryl's arguments, the trial court did not fail to consider his testimony that refuted the existence of an agreement to reconvey. Rather, the court weighed the evidence and simply found Deborah's evidence more persuasive. Credibility determinations are left to the fact-finder and we may not second guess them. Accordingly, we overrule this argument.

C. Trial court's application of equity

{¶25} Daryl's next argument is that in its decision to remove the oral agreement from the Statute of Frauds, the trial court relied on sympathy for Deborah, rather than a legal or factual basis.

{¶26} In an action for specific performance, part performance is an equitable doctrine that renders the Statute of Frauds inoperative. *Jones v. Bonzo* (Oct. 30, 1991), Lawrence App. No. 1977, 1991 WL 224159, at *4, citing *Tier*, supra. Although the facts establishing part performance must be established by clear and convincing evidence, see *Nofzinger*, supra, the ultimate decision to apply equitable doctrines is generally left to the discretion of the trial court and we review it under the abuse of discretion standard. *Home Natl. Bank v. Buckallew*, Meigs App. Nos. 06CA2, 06CA3, 2007-Ohio-1339, at ¶34. "The term 'abuse of discretion' connotes more than an error of * * * judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying this standard, a reviewing court is not free to merely substitute its judgment for that of the trial court. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181.

{¶27} The Statute of Frauds provides that “‘no action shall be brought’ regarding an ‘interest in or concerning’ land unless the agreement upon which the action is based is in writing and signed by the defendant.” *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 438-39, 1996-Ohio-194, 662 N.E.2d 1074, quoting R.C. 1335.05. But the doctrine of part performance creates an exception to this rule. The Supreme Court of Ohio explained: “[i]n an action for specific enforcement of an oral contract for the sale of land, equity intervenes to render the statute of frauds inoperative only when a failure to enforce the contract will result in fraud and injury. To entitle one claiming to have purchased land to enforce an oral contract for the conveyance thereof, he must, in reliance on the promise, have performed acts which changed his position to his prejudice.” *Tier*, supra, at 526. As already noted, a party seeking to apply the doctrine of part performance must prove the acts constituting part performance by clear and convincing evidence. See *Geiger*, supra, at *2.

{¶28} Ohio courts have considered some or all of the following as indicia of acts establishing part performance: “(1) evidence of a change in who possesses the land, (2) payment of all or part of the consideration for the land, and (3) improvements, alterations or repairs upon the land.” *Id.* at *4. Such acts provide circumstantial proof of an actual agreement. In *Lewis v. Shafer* (Apr. 12, 1979), Lawrence App. No. 1391, 1979 WL 206800, we explained “[w]hat is required * * * is that the acts be connected with and in consequence of the contract and in pursuance of its terms, and a failure to enforce the contract would be inequitable and result in fraud and injury.” *Id.* at *2.

{¶29} As Deborah points out, the trial court made findings concerning acts of part performance. The court found that Deborah and Richard lived in the mobile home

until Richard's death in July 2004, paid taxes at least until Richard's death¹, and made improvements to the property including building a garage and removing trees. The court concluded it would exercise its equity powers and take the oral agreement out of the Statute of Frauds because of "past performance by [Deborah] and Richard by exercising their dominion and control over the land and mobile home up to Richard's death." The court further stated: [t]he plaintiffs are estopped from reaping the benefits of the Statute of Frauds when to do so could result in an unjust result."

{¶30} In its judgment entry the court never specifically stated that it found clear and convincing evidence of acts constituting partial performance. However, Daryl did not request specific findings of fact or conclusions of law under Civ.R. 52. Therefore, absent evidence to the contrary, we presume regularity in the trial court's proceedings and assume that such acts were sufficient to establish part performance. See *Carter v. Carter*, Clark App. No. 2008 CA 54, 2009-Ohio-3637, at ¶10; *In re Nibert*, Gallia App. No. 03CA19, 2004-Ohio-429, at ¶5.

{¶31} Accordingly, the court did not rely on "sympathy" as Daryl suggests. Rather, its decision was based upon sufficient factual findings of partial performance and the discretionary choice to employ the doctrine of part performance to avoid an unfair result. Based on the foregoing, we perceive no abuse of discretion by the trial court and overrule this argument.

IV. Conclusion

{¶32} For reasons unknown to us, the parties and the trial court ignored the "Florida situation" and its implication on the use of equity in this case. The clean hands

¹ Daryl claims he paid taxes on the land after Richard's death although Deborah believed that she paid taxes on the land "through 2006."

doctrine states “he who seeks equity must do equity *** he must come into Court with clean hands.” *Hurst v. Hurst*, Ross App. No. 07CA2980, 2008-Ohio-3462, at ¶29, quoting *Christman v. Christman* (1960), 171 Ohio St. 152, 154, 168 N.E.2d 153. The basic principal is that the party seeking to invoke the equitable powers of the court must himself be free from “reprehensible conduct” concerning the subject matter of the lawsuit. *Goldberger v. Bexley Properties* (1983), 5 Ohio St.3d 82, 85, 448 N.E.2d 1380.

{¶33} The admitted purpose of Deborah’s and Richard’s conveyance to Daryl and Tammy was to ensure that their Hillsboro property would not be subject to satisfying any deficiency judgment after a foreclosure sale of their Florida home. As fate would have it, the Florida home apparently sold for almost twice as much as the balance on the mortgage. Thus, no deficiency judgment ever occurred in Florida. Nonetheless, the transaction appears suspect -- attempting to defraud the elder Bumgarner’s Florida creditors by using Daryl and Tammy as “straw men.” The trial court made no explicit factual findings in this regard. The parties seemed unconcerned as well, never drawing the issue out at trial, only pointing to it as proof that an oral agreement existed.

{¶34} Accordingly, we overrule Daryl’s first and second assignments of error. The record supports the trial court’s finding of clear and convincing evidence of an oral contract to reconvey the real estate and mobile home to Deborah. Furthermore, the trial court did not rely on sympathy, but relied upon clear and convincing evidence of partial performance in exercising its equitable power to remove the oral argument from the Statute of Frauds.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellants shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Highland County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.