STATE OF MICHIGAN

COURT OF APPEALS

LILLIAN ROSE JOHNSON, Plaintiff-Appellee,	UNPUBLISHED May 28, 2013
v	No. 307572 Delta Circuit Court
RANDY LOUIS JOHNSON, Defendant-Appellant, and	LC No. 10-020594-CH
RANDY RODERICK JOHNSON, Defendant.	

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant[1] appeals as of right the trial court's order, following a bench trial, quieting title to a 100-acre farm. For the reasons set forth below, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

This case involves a dispute between plaintiff and defendant regarding a 100-acre family farm. Plaintiff is the elderly widowed mother of defendant. In April 2004, plaintiff mortgaged five acres of the farm as collateral for a loan so that defendant could build a barn on the five acres. Once the barn was constructed, the property value of the farm increased, and plaintiff became dissatisfied with her increased tax liability. On January 31, 2005, plaintiff and defendant

[1] Randy L. Johnson is the father of Randy R. Johnson. It is unclear as to why Randy R. Johnson was named as a defendant in this case. Virtually no evidence was presented to show Randy R. Johnson's relationship to this case. The trial court found that Randy R. Johnson had resided with defendant for some time, and that "there has been no showing that he directly damaged any of Plaintiff's property nor occupied any place other than his father's residence." We will therefore refer to Randy L. Johnson as "defendant."

drove to a law firm, without a prior appointment, to consult with an attorney to prepare a deed. Plaintiff testified that the purpose of the consultation was to have a deed prepared transferring the five mortgaged acres to defendant so she would no longer be liable for the increased property tax. On the other hand, defendant testified that the purpose of the consultation was to have a deed prepared transferring the entire farm to him while retaining legal protections for plaintiff during the remainder of her lifetime. Because plaintiff was elderly and suffering from health complications, she waited in the car while defendant entered the law firm alone to speak with the attorney. On the basis of his consultation with defendant, the attorney prepared a deed transferring the entire farm to defendant and retaining a life estate in the farm for plaintiff. After the "life-estate deed" was prepared, the law firm's legal secretary went outside to the car to obtain plaintiff's notarized signature on the deed. The drafting attorney's notes indicated, and defendant acknowledged, that he advised defendant that plaintiff would retain the greatest flexibility if the deed was not recorded until after her death.

Despite this advice, the life-estate deed was recorded by defendant on March 14, 2006. The trial court found that plaintiff intended, after leaving the law office, to retain possession of the deed pursuant to the drafting attorney's instructions, that the unrecorded deed "ended up" in plaintiff's safe, and that defendant had removed the life-estate deed from the safe without plaintiff's knowledge or permission. In 2009, plaintiff learned that she only held a life-estate interest in the farm. Defendant apparently refused to convey the farm back to plaintiff. Plaintiff filed suit with the trial court to quiet title to the property. The trial court concluded that the life-estate deed should be set aside on the alternative grounds of fraud, unconscionability, and lack of delivery. The trial court determined that defendant committed two acts of fraud: (1) misrepresenting plaintiff's intent to the attorney on January 31, 2005; and (2) removing the life-estate deed from plaintiff's safe on or before March 14, 2006 without plaintiff's knowledge or permission. The trial court also found that the deed had never been delivered to defendant, and that the deed was obtained by unconscionable acts.

II. STANDARD OF REVIEW

We review the trial court's legal holdings in an equitable action de novo. *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001). We review the trial court's findings of fact for clear error. *Id.*

III. FRAUD

Defendant first argues that the trial court erroneously granted plaintiff relief on the basis of fraud. We agree. Fraud in the inducement occurs when a party knows the contents of an instrument but was induced by fraud to execute the instrument. *Stefanac v Cranbrook Ed Community*, 435 Mich 155, 165-166; 458 NW2d 56 (1990). Fraud in the execution occurs when a party does not know the contents of the instrument. *Id.* Because the trial court did not specify whether it was basing its finding on fraud in the inducement or fraud in the execution, we will address each type of fraud in turn.

To prove a claim of fraud in the inducement, a plaintiff must establish the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that [it] was false, or made it recklessly, without knowledge of its truth and as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [*Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 161; 742 NW2d 409 (2007) (citations and quotation marks omitted).]

Defendant's alleged misrepresentation to the attorney cannot support a conclusion of fraud in the inducement. The fifth element requires that the plaintiff act in reliance upon the defendant's representation. However, it is impossible for plaintiff to have acted in reliance upon defendant's representation to the attorney; because she was not even aware of the representation, she logically could not have acted in reliance upon it. In other words, defendant's misrepresentation was made to and relied upon by a third party; it was not made to and relied upon by plaintiff.

Further, a claim of fraudulent misrepresentation "requires reasonable reliance on a false representation." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 464; 517 NW2d 235 (1994). "There can be no fraud where a person has the means to determine that a representation is not true." *Id*. Moreover, this Court has held that "a person who signs and executes an instrument without inquiring as to its contents cannot have the instrument set aside on the ground of ignorance of the contents." *Christensen v Christensen*, 126 Mich App 640, 645; 337 NW2d 611, lv den 417 Mich 1100.45 (1983). Here, plaintiff clearly had an opportunity to inquire whether the life-estate deed only transferred five acres before she executed the deed. Plaintiff could have simply read the life-estate deed, consulted with an attorney before signing the deed, or asked the drafting attorney or his staff about the contents of the deed. Although plaintiff did testify that she asked the legal secretary about the contents of the deed, the legal secretary testified to the contrary; the trial court never made a factual finding regarding their conversation. Based on the element of reasonable reliance, we cannot conclude on the record before us that defendant fraudulently induced his mother to sign the deed, despite evidence of his intent to do so.

If defendant in fact removed the life-estate deed from the safe, such removal also cannot support plaintiff's claim of fraud in the inducement, because the act of stealing a deed does not relate to fraud in the inducement. Rather, stealing a deed and recording it without permission relates to the issue of delivery, as discussed in Section V, *infra*. There is no misrepresentation involved when a person steals a deed without the owner's knowledge. Thus, the record shows that plaintiff did not establish the elements of fraud in the inducement.[2]

[2] Plaintiff does not argue, and the trial court did not find, either that (a) defendant misrepresented to plaintiff that he would tell the attorney to prepare a deed to transfer five acres, and that

"'Fraud in the execution' or factum means the proponent of the instrument told the signatory thereof that the instrument really didn't mean what it clearly said, and that the signatory relied on this fraud to his detriment." *Paul v Rotman*, 50 Mich App 459, 463-464; 213 NW2d 588 (1973). In this case, the trial court found that plaintiff did not understand the contents of the life-estate deed. But this finding is insufficient to support a claim of fraud in the execution. The trial court did not find that plaintiff was told that the life-estate deed transferred only five acres. Instead, the trial court found that plaintiff did not understand the nature and legal effect of the life-estate deed. This finding may indicate mental incompetency or procedural unconscionability, but it does not indicate fraud in the execution. The trial court's findings of fact are insufficient to affirm its decision on the basis of fraud in the execution.

IV. UNCONSCIONABILITY

Next, defendant argues that the trial court erroneously granted plaintiff relief on the basis of unconscionability. We agree. To grant relief from a contract on the basis of unconscionability, there must be a showing of both "procedural unconscionability" and "substantive unconscionability." *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005). "Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term." *Id*. at 144. "Substantive unconscionability exists where the challenged term is not substantively reasonable." *Id*.

The trial court did not explicitly address procedural and substantive unconscionability. However, the opinion suggests a finding that the life-estate deed was procedurally unconscionable on the basis of the circumstances surrounding execution of the life-estate deed in January 2005. The trial court noted that plaintiff was elderly and on pain medication, and that defendant did not return to the vehicle to bring plaintiff inside to speak with the attorney. The trial court reasoned that these facts suggested that defendant deliberately isolated plaintiff from the attorney so that plaintiff would not have an opportunity to explain her true intent or understand the contents of the life-estate deed. In light of plaintiff's age and limited education, the trial court's finding that plaintiff did not have the capacity to understand or critique the life-estate deed was supported by the record. A party's advanced age and lack of education are factors in favor of a finding of procedural unconscionability. See *Johnson v Mobil Oil Corp*, 415 F Supp 264, 268 (ED Mich 1976) (explaining that procedural unconscionability involves such factors as "age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party. . ."). The trial court's implicit finding of procedural unconscionability was reasonable and supported by the record.

However, we conclude that the life-estate deed was not substantively unconscionable. The transaction appeared to be an unremarkable gift of real property from an elderly parent to a

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plaintiff relied on that representation in signing the deed; or (b) the deed should be invalidated under the doctrine of undue influence. See, e.g., *In re Karney Estate*, 468 Mich 68; 658 NW2d 796 (2003). Because those issues are not before us, we decline to address them. See *MEA v SOS*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194; 801 NW2d 35 (2011).

child. In other words, the transaction at issue is more of a "gift," not a business transaction. Moreover, we note that certain facts weigh against a finding of substantive unconscionability: plaintiff retained a life estate in the farm, defendant worked on the farm for several years, and defendant was told by his parents that he would eventually receive the farm. Accordingly, we conclude that the terms of the life-estate deed were not substantively unconscionable. Indeed, "a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other." *Clark*, 268 Mich App at 144.

IV. DELIVERY

Defendant also argues that the trial court clearly erred by finding that there was no delivery of the life-estate deed, because its finding that defendant removed the deed from plaintiff's safe is unsupported by the record. We agree in part.

Insofar as the trial court's finding may be premised on defendant's removal of the deed from the safe, we do not find record evidence supporting that particular finding. Rather, the evidence is wanting as to the whereabouts of the deed after its preparation and prior to its recordation.

Here, the trial court found that the unrecorded deed was placed in plaintiff's safe on the farm, and that plaintiff intended to follow the "strong suggestion" of the drafting attorney to "retain the deed in a safe place and not allow its recording, perhaps not until after her death." The trial court further found that defendant removed the deed from the safe without plaintiff's knowledge or permission and took it to the register of deeds to be recorded, and that although plaintiff may or may not have accompanied him on that trip, she lacked the knowledge that defendant intended to, and did, record the deed. The court found credible plaintiff's testimony that she was never aware that defendant had recorded the deed. Finally, the court accepted the testimony of plaintiff's attorney that plaintiff was "genuinely surprised" to learn that the deed had been recorded.

Plaintiff's testimony was somewhat confused regarding what happened to the deed after she signed it. She testified that she never saw the deed again after she signed it and the legal secretary returned it to the office. However, she later testified that the deed was in her safe. It appears from the record that plaintiff had some difficulty distinguishing between the "deed" at issue and other deeds or the "mortgage" that she had signed earlier to allow defendant to borrow money to build a barn. No clear testimony was ever directly elicited from plaintiff regarding whether she placed the deed in the safe, whether defendant did so, or whether in fact defendant retained the deed after they left the lawyer's office. Plaintiff did testify that "the deed is gone" from her safe, and that the deed was not in her safe when she last looked in the safe "four or five years ago." However, plaintiff *also* testified that she never saw the original deed, and that she may not have asked defendant about the whereabouts of the original deed. Plaintiff testified that as soon as she became aware that her property was referred to on tax forms as "Lillian Johnson Life Estate," she questioned defendant about it. Finally, plaintiff testified that she continued to attempt to pay her property taxes, only to have the money returned because defendant had already paid them. Plaintiff testified that while she may have gone to the courthouse with

defendant at some point, possibly when defendant recorded the deed,[3] she testified that she was unaware of why they went there and was not aware the deed was being recorded.

On defendant's part, he testified that his mother agreed to have a quit-claim deed to the property prepared. Defendant also claimed that he gave the life-estate deed to plaintiff when he returned to the car and that when they arrived back at the farm, plaintiff said, "Here's your piece of paper you wanted" and that defendant "held onto it a long time" before finally recording it notwithstanding the drafting attorney's instructions because various people had told him to record it. Defendant testified that plaintiff was aware that the deed was being recorded when she accompanied him to the courthouse.

We are unable to conclude, on the record before this Court, that the trial court's factual finding regarding the removal of the deed from plaintiff's safe has the requisite evidentiary support. *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007). Plaintiff's testimony, as it appears on the record, is contradictory; however plaintiff did clearly state that she never saw the deed again after the visit to the attorney's office, whereas her testimony concerning the deed's placement in the safe was vague and quite possibly referred to another deed or to a mortgage document, rather than the deed in question. We conclude that the record evidence before the trial court appeared to support at least three possible conclusions with respect to delivery: (1) the trial court could have credited plaintiff's testimony and found that defendant kept the life-estate deed himself, never returning it to plaintiff; (2) the trial court could have credited defendant's testimony and found that plaintiff gave defendant the life-estate deed once they returned home; or (3) the trial court could have declined to make any finding of fact on this issue. However, the record does not support the trial court's finding that defendant removed the deed from the safe without permission. We hold that this factual finding was clear error.

This is not, however, dispositive of the issue before us. Rather, the issue before us is whether, irrespective of who possessed the life-estate deed between its preparation and its recordation, or where it was kept, plaintiff ever "delivered" the deed to defendant.

Defendant misperceives the meaning of this "delivery" requirement, suggesting that all that is required is that he "received" the deed. But as the trial court correctly concluded, "delivery" requires more than mere "receipt."

A deed transfers an interest at the time of delivery, not at the time of recording. *Ligon v Detroit*, 276 Mich App 120, 128; 739 NW2d 900 (2007). "The purpose of the delivery requirement is to show the grantor's intent to convey the property described in the deed." *Energetics, Ltd v Whitmill*, 442 Mich 38, 53; 497 NW2d 497 (1993). Delivery does not necessarily require a physical transfer of the deed; instead, delivery simply requires "acts or words" of the grantor that show "an intention on [the grantor's] part to perfect the transaction. . . ." *Schmidt v Jennings*, 359 Mich 376, 381; 102 NW2d 589 (1960). Manual delivery of a deed to

[3] There was some testimony to the effect that this trip to the courthouse may have concerned a utility easement for defendant's barn, although this was never definitely established in the record.

a grantee is not conclusively dispositive on the issue of delivery. *Resh v Fox*, 365 Mich 288, 290-292; 112 NW2d 486 (1961). "[I]n considering whether there was a present intent to pass title, courts may look to the subsequent acts of the grantor." *Havens v Schoen*, 108 Mich App 758, 762; 310 NW2d 870 (1981). When a grantee obtains a deed without the grantor's knowledge or permission, there is no delivery. *Id*. at 765.

The issue, therefore, is not whether defendant "received" the deed, but rather whether plaintiff intended "to convey the property described in the deed." *Energetics*, 442 Mich at 53. There was some evidence presented to the trial court of plaintiff's lack of intent to convey the property. Evidence showed that plaintiff continued to manage the property and pay all expenses for it, as well as attempted to provide for the devise of her property in her will—all evidence of her *lack* of intent to convey it presently. See *Havens*, 108 Mich App at 761; see also *Resh*, 365 Mich at 290-292.

Resh is instructive as a case where, despite possession of the deed by the grantee, the court found that the grantor lacked the requisite intent to constitute delivery. *Resh*, the grantor, at the time unmarried, prepared two quitclaim deeds for properties he owned, conveying his entire interest to his sister, and gave them to his sister with instructions not to record the deed during his lifetime. *Id*. at 290. Seventeen years later, the grantor married and executed a quitclaim deed to both parcels, giving interests to his wife, sister, and brothers. He gave the deed to his wife and instructed her not to record it during his lifetime. *Id*. During his lifetime, the grantor maintained the property as his own and paid all taxes and upkeep on the property. *Id*. at 290-291. The trial court found that, although there was manual delivery of the first two deeds to the defendant, at the time of delivery there was no intent to pass title. The trial court thus vacated the two deeds. *Id*. at 291.

Our Supreme Court affirmed, finding that the record "amply" sustained the conclusion that there was no intent to pass *present* title at the time of delivery of the deeds to defendant. *Id*. at 292. The Court noted the deferential standard of review a reviewing court gives to findings of fact by the trial court, especially in regard to witness credibility. *Id*. The Court thus affirmed the trial court's vacation of the deeds. *Id*. at 293.

The trial court may ultimately be correct that the evidence shows a lack of intent to effect "delivery." However, (and unlike in *Resh*) the trial court here erred in its assessment of the evidence in the context of the applicable burden of proof. The trial court correctly noted that defendant bears the ultimate burden of proof regarding delivery. However, the trial court failed to recognize that recording a deed gives rise to a presumption of delivery. *Energetics*, 442 Mich at 53. This presumption is "but a rule of procedure used to supply the want of facts." *Hooker v Tucker*, 335 Mich 429, 434; 56 NW2d 246 (1953). While it "merely shifts the burden of proof onto the party questioning the delivery," *Havens*, 108 Mich App at 761, the burden so shifted is "the burden of moving forward with the evidence[;]" the burden of persuasion, i.e., the burden of proving delivery by a preponderance of the evidence, remains with the party relying on the deed. *Id*. When the party burdened by the presumption presents sufficient evidence to dispel the presumption, the opposing party must still carry the "burden of proving delivery and requisite intent." *Id*.

On remand, the trial court should assess the evidence in the context of the burden of proof. It should first determine if plaintiff has presented sufficient evidence to rebut the presumption of delivery. *Havens*, 108 Mich App at 761. Then, if plaintiff has done so, it should determine if defendant has carried his ultimate burden of proving delivery and requisite intent. *Id.*

We therefore reverse the trial court's conclusion on the issue of delivery, and remand for the trial court to reconsider the record evidence relating to delivery of the life-estate deed in light of the applicable presumption and shifting burdens of proof, and to make new findings of fact on this issue as it may deem appropriate. MCR 7.216(A)(7).

V. UNDUE INFLUENCE

Further, we note that plaintiff's complaint identified several equitable grounds for relief, including undue influence. Our review of the record suggests a justiciable issue with respect to undue influence, specifically whether plaintiff was functioning at a relatively low physical and mental capacity at the time she executed the life-estate deed, see *In re Cox Estate*, 383 Mich 108, 113-114; 174 NW2d 558 (1970) ("weakened physical and mental condition" suggests undue influence), and whether plaintiff trusted defendant as her son to properly inform the attorney of her intent, *Daane v Lovell*, 83 Mich App 282, 290; 268 NW2d 377 (1978), lv den 405 Mich 846 (1979) (close personal relationship is a factor that may indicate undue influence). This issue was raised by plaintiff's complaint but was not addressed by the trial court. Accordingly, on remand the trial court should also consider the record evidence and make findings of fact and conclusions of law on the issue of undue influence. MCR 7.216(A)(7).

Reversed and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra

Court of Appeals, State of Michigan

ORDER

Lillian Rose Johnson v Randy Louis Johnson

Docket Nos. 307572

LC No. 10-020594-CH

Amy Ronayne Krause
Presiding Judge

Elizabeth L. Gleicher

Mark T. Boonstra
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until after they are concluded. As stated in the accompanying opinion, we remand this case to the trial court to determine whether plaintiff has presented sufficient evidence to dispel the presumption of delivery, and if so, to determine if defendant carried his ultimate burden of proving delivery. Additionally, the trial court should consider whether the record evidence supports plaintiff's claim of undue influence.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
TUEBOR
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A true copy entered and certified by Larry S. Royster, Chief Clerk, on

MAY 28 2013

Date

Chief Clerk