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IN THE
COURT OF APPEALS OF INDIANA

Thomas R. Fox,
Appellant-Defendant,

v.

Judith Ann Barker,
Appellee-Plaintiff.

May 17, 2021

Court of Appeals Case No. 20A-PL-2003

Interlocutory Appeal from the Miami Superior Court

The Honorable Daniel C. Banina, Judge

Trial Court Cause No. 52D02-1708-PL-188

Weissmann, Judge.

[1] Love lends itself more easily to poetry, but only contract can transform devotion into law. Here, we have a deed, on which Thomas Fox and Judith Barker were listed as tenants in common. More than a decade after their relationship ended, the deed remains.

[2] Barker filed suit to partition the property, and the trial court granted her partial summary judgment. The court found that the ex-lovers remain tenants in common, entitling Barker to an equal share of the farm, subject to adjustment by a jury. Despite Fox's many creative arguments, we uphold the trial court's order.

Facts

[3] Fox and Barker (née Houlihan) lived together for about ten years. They were not married, but they joked that they were "pretty much stuck with each other." App. Vol. III, p. 40. Several years into their relationship, Barker started to worry about what would happen to her if Fox died. In response, Fox purchased a 99-acre farm and put both of their names on the deed. The two were listed as tenants in common. App. Vol. II, p. 80.

[4] About six years later, the relationship ended. Eight years after that, Barker sued to partition the property. Fox counterclaimed, claiming breach of settlement and seeking to reform the deed. Barker moved for partial summary judgment, which the trial court granted. It found that Barker and Fox were tenants in common and that Barker is entitled to an equal share of the farm, less any

appropriate equitable adjustment to be determined by the jury. Fox now brings this interlocutory appeal.

Discussion and Decision

[5] Fox argues that the deed should be reformed to show Fox as the sole owner of the farm because Barker's rights to the land were a gift he contemplated but never completed. Fox argues that partial summary judgment was improper because Barker failed to dispose of his affirmative defenses that: (1) Barker has no claim to the farm because his gift was never completed; and (2) Barker settled any claim she may have had to the farm, and she is in breach of that agreement; and (3) she should be equitably estopped from denying the settlement.

[6] We apply the same standard as the trial court when reviewing summary judgment rulings. *McCullough v. CitiMortgage*, 70 N.E.3d 820, 824 (Ind. 2017). The moving party (Barker) bears the burden of showing that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. *Id.* Summary judgment is improper if the moving party fails to meet this burden, or, if it does, the nonmoving party (Fox) establishes a genuine issue of material fact. *Id.* We construe all factual inferences in the nonmoving party's favor, and all doubts as to the existence of a material issue against the moving party. *Id.*

I. Reformation[1]

[7] Despite the plain language of the deed, which lists both Fox and Barker as grantees, Fox argues that the deed should be reformed to make him sole owner. Usually, reformation is "an extreme equitable remedy to relieve the parties of *mutual mistake* or fraud." *Estate of Reasor v. Putnam Cnty.*, 635 N.E.2d 153, 158 (Ind. 1994) (quoting *Bd. of Comm'rs of Hamilton Cnty. v. Owens*, 138 Ind. 183, 186, 37 N.E. 602 (1894)) (emphasis added). But "[a] deed given as a gift can be reformed by proof of clear and convincing evidence that a unilateral mistake was made in the execution of the deed." *Wright v. Sampson*, 830 N.E. 2d 1022, 1027 (Ind. Ct. 2005). Fox says that he did not intend to become tenants in common with Barker, that he did not understand the significance of putting her name on the deed, and that his mistake alone can justify reformation.

[8] Fox's argument is built on a faulty foundation. Regardless of whether the deed was a gift, Fox's unilateral mistake cannot justify reformation. His confusion over the nature of the instrument was a mistake of law, not one of fact. The distinction between mistakes of law and fact has fallen away in many jurisdictions, but it remains in Indiana. 65 Am. Jur. Proof of Facts 3d 217 § 7 (2002) ("[T]he distinction [between mistakes of law and fact] has become less

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[1] In their briefs, the parties focus on whether statements Fox made in support of a motion in limine were binding admissions that Barker had an equal right to the farm. The issue, however, is irrelevant. The text of the deed controls. *Tazian v. Cline*, 686 N.E.2d 95, 97 (Ind. 1997). "Where there is no ambiguity in the deed, the intention of the parties must be determined from the language of the deed alone." *Id.* (quoting *Hefty v. All Other Members of the Certified Settlement Class*, 680 N.E.2d 843, 853 (Ind. 1997)). The deed at hand clearly states that Fox and Barker are tenants in common. App. Vol. II, p. 80.

important over time."); *cf. Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1199 (Ind. 2008) (excepting testamentary trusts from the general rule that "reformation may only be had for mistakes of fact"). Misstating the bounds of property to be conveyed is a mistake of fact. (*See, generally, Comstock v. Coon*, 135 Ind. 640, 35 N.E. 909 (1893); *Colton v. Lewis*, 119 Ind. 181, 21 N.E. 475 (1889); 25 Ind. Law Encyc. Reformation of Instruments § 10. Misunderstanding the legal effect of a known fact or situation—like thinking a deed operates like a will—is a mistake of law. *Carlson,* 895 N.E.2d at 1199; *Mistake of Law*, *Black's Law Dictionary* (11th ed. 2019).

[9] Regardless of what Fox believed he was doing, the legal effect of putting Barker's name on the deed was to make the two tenants in common. Because Fox is mistaken about the nature of the deed itself, we cannot reform it. *See, e.g.*, *Hudson v. Davis*, 797 N.E.2d 277, 285 (Ind. Ct. App. 2003) ("We may not reform an agreement to correct the drafter's mistake of law.")

II. Fox's Affirmative Defenses

[10] Fox asserts three affirmative defenses to show that Barker has no claim to the farm. In summary judgment proceedings, a "defendant must show that a genuine issue of material fact exists as to *each* element of the asserted affirmative defense." *Abbott v. Bates*, 670 N.E.2d 916, 923 (Ind. Ct. App. 1996) (emphasis in original). Fox does not meet this burden.

A. Incomplete Gift

[11] First, Fox argues that he never intended to immediately and irrevocably part with absolute title and control of the property and instead intended a posthumous bequest. *See generally Heaphy v. Ogle*, 896 N.E.2d 551, 557 (Ind. Ct. App. 2008) ("The donor must intend to part irrevocably with absolute title and control of the thing given at the time of making the gift."). Fox also argues that he did not deliver title to Barker, meaning there was no gift. *Id.* ("Delivery is an indispensable requirement without which a gift fails. . ."). He argues Barker therefore has no claim to the property.

[12] But Fox never had absolute title and control of the property. The previous owners conveyed the property to Fox and Barker at the same time via the same instrument. App. Vol. II, p. 80. When the deed was delivered to Fox, transfer of title to *both* Barker and him as tenants in common took immediate effect. *Stout v. Dunning*, 72 Ind. 343, 347 (Ind. 1880); *see also* 10 Ind. Law Encyc. Deeds § 27 ("[W]here a deed is delivered to one of two or more cograntees, it will operate as a delivery to all."); 23 Am. Jur. 2d Deeds § 121. As Part I, *supra*, explains, Fox's bare intentions do not nullify the text of the deed or its inherent function. This deed is not a will, nor was it an incomplete gift.

B. Settlement Agreement

[13] Second, Fox argues that the parties reached a compromise settlement agreement, which Barker breached when she filed suit. Fox says Barker wrote him a note—a note he has since lost—requesting Fox pay Barker's credit card

bill and seeking to recoup her investment in the farm. Though the fact of this purported settlement is in dispute, Fox fails to show it is material. "A fact is 'material' if its resolution would affect the outcome of the case." *Williams v. Tharp*, 914 N.E.2d 756, 762 (Ind. 2009). Setting aside whether Fox has alleged the prima facie requirements for a contract,[2] he has certainly not alleged one that is enforceable. An unenforceable contract is not a material fact.

[14] Under Indiana's statute of frauds, land conveyances are only enforceable if the contract is signed by the person an action is brought against. Ind. Code § 32-21-1-1(b)(4); *Brown v. Branch*, 758 N.E.2d 48, 51 (Ind. 2001). Additionally, "an enforceable contract for the sale of land must be evidenced by some writing . . . which states with reasonable certainty each party and the land; and . . . the terms and conditions of the promises and by whom the promises were made." *Knapp v. Estate of Wright*, 76 N.E.3d 900, 907 (Ind. Ct. App. 2017) (quoting *Schuler v. Graf*, 862 N.E.2d 708, 713 (Ind. Ct. App. 2007)).

[15] Fox fails to designate evidence showing that the note was signed or contained essential terms. Fox does not allege the contents of the letter beyond Barker supposedly writing something along the lines of, "this is the money I had

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[2] Settlement agreements are governed by general principles of contract law. *Georgos v. Jackson*, 790 N.E.2d 448, 453 (Ind. 2003). The essential elements of a contract are offer, acceptance, and consideration. *Stardust Ventures, LLC v. Roberts*, 65 N.E.3d 1122, 1127 (Ind. Ct. App. 2016). "Consideration requires a bargained-for exchange." *AM General LLC v. Armour*, 46 N.E.3d 436, 443 (Ind. 2015). In his brief, Fox alleges that Barker told him she "wanted out" and sent him a note telling Fox to pay off her credit card bill and return the $5,000 she had invested in the farm, which he did. These allegations show detriment to Fox, but nothing in exchange from Barker.

invested in the farm and I want it back." Appellant's Br., p. 29. He provides no evidence of the conditions of her promise beyond the "implication" she was giving up her rights to the property. Appellant's App. Vol. II, p. 113. But the statute of frauds requires essential terms be reduced to writing for the very purpose of avoiding reliance on implication. *See Knapp*, 76 N.E. 3d at 906-07. Whether an unenforceable settlement existed is not a genuine issue of material fact that would render summary judgment improper.

[16] Fox attempts to circumvent the statute of frauds by asserting part performance, an equity doctrine intended to prevent a party that breaches an oral contract from using the statute of frauds to get off scot-free. *Coca-Cola Co. v. Babyback's Intern., Inc.*, 841 N.E.2d 557, 566 (Ind. 2006). Payment, possession, and valuable improvements on the land can be cited as acts of performance that form the basis for applying the doctrine, but these acts are not elements of part performance. *Spring Hill Devs., Inc. v. Arthur*, 879 N.E.2d 1095, 1104-05 (Ind. Ct. App. 2008). They indicate very little "unless they are of a kind that would not have been made had there been no oral contract." *Marathon Oil Co. v. Collins*, 744 N.E.2d 474, 479 (Ind. Ct. App. 2001) (citing 4 Corbin on Contracts § 18.15, p. 541 (Rev. ed.1997)). We instead consider whether reasonable reliance on the contract "so changed [the party seeking enforcement's] position that injustice can be avoided only by specific enforcement." *Spring Hill Devs., Inc.*, 879 N.E.2d at 1105 (citing Restatement (Second) of Contracts § 29; *cf. Summerlot v. Summerlot*, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980)). Where restitution is adequate to prevent injustice, specific performance is not necessary. *Id.*

[17] Fox's position has changed since his alleged settlement with Barker, but not in a manner that necessitates specific performance. Most significantly, Fox never *took* possession under the alleged settlement—he already had it. *See* Appellant's Br., 30 ("Barker never had physical possession of the farm."). His improvements to the farm—cutting trees, installing drainage tile, constructing a culvert—are not clearly consequences of the alleged settlement, either. Fox has offered no reason to believe he would have refused to make these improvements to benefit himself had he known Barker stood to benefit, too. Finally, if Fox's payments to Barker were unjust, restitution is the ideal remedy. It follows that any injustice stemming from this transaction can be resolved in the equitable adjustment proceedings yet to come.

C. Equitable Estoppel

[18] Third and finally, Fox argues that Barker is equitably estopped from denying the settlement agreement and maintaining this suit because Fox reasonably relied on that agreement. Estoppel doctrines generally prevent "one who by deed or conduct has induced another to act in a particular manner" from adopting an inconsistent position that causes injury to such other. *Lockett v. Planned Parenthood of Ind.*, 42 N.E.3d 119, 135 (Ind. Ct. App. 2015). Equitable estoppel is a defense that applies when the party claiming estoppel: (1) lacks knowledge and the means of knowledge of the facts in question; (2) relied on the conduct of the party to be estopped; and (3) experienced a prejudicial change in position because of that conduct. *Doe v. Carmel Operator, LLC*, 160 N.E.3d 518, 523 (Ind. 2021). Because Barker did not address this defense in her

brief, we review for prima facie error, or error at first sight. *Nance v. Miami Sand & Gravel, LLC*, 825 N.E.2d 826, 837 (Ind. Ct. App. 2005).

[19] Fox's argument is difficult to decipher as he does not specify the information he was lacking. If an agreement existed—and we already found in section II.B., *supra*, that it did not—Fox and Barker would have had access to the same information. Perhaps Fox relied on his understanding of Barker's note to his detriment, but this does not satisfy the elements of equitable estoppel. Fox's alleged losses seem ripe for the equitable adjustment reserved for the jury by the court below. We see no need to address them here.

[20] In light of the above analysis, the partial summary judgment order was proper. The judgment of the trial court is affirmed.

Kirsch, J., and Altice, J., concur.