STATE OF MICHIGAN

COURT OF APPEALS

PALDEVCO LIMITED PARTNERSHIP,

Plaintiff-Appellant,

v

CITY OF AUBURN HILLS,

Defendant-Appellee.

UNPUBLISHED
December 18, 1998

No. 202134
Oakland Circuit Court
LC No. 95-496877 CZ

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying its motion for summary disposition, granting summary disposition in favor of defendant, and denying plaintiff's motion for reconsideration and for leave to amend its complaint. We affirm.

In September 1985, Irene Tanski sold undeveloped property located in the City of Auburn Hills, Tax Code No. 14-02-451-016, to Carolyn and John Waltman on a six-year land contract. On March 29, 1991, the Waltmans granted Mitan Properties Company, II, an option to purchase the property. Plaintiff received an assignment of the option and subsequently executed a document titled "Exercise of Option" on May 13, 1991. On August 26, 1991, plaintiff brought a lawsuit against the Waltmans alleging that junk tires on the property caused a waste and hazard and that the Waltmans should either cure the problem or reduce the purchase price.

Defendant also filed a lawsuit against the Waltmans on August 13, 1992, in which it sought to add the cost of removal and disposal of the approximately 150,000 used tires and debris from the property to the delinquent tax roll. However, by August 13, 1992, the Waltmans had defaulted on the land contract as a result of failing to pay property taxes for the years 1989 to 1992. Defendant filed a lis pendens on October 28, 1992, regarding the lawsuit it had brought against the Waltmans.

Pursuant to a warranty deed dated December 11, 1992, Tanski conveyed the property to plaintiff. On March 24, 1993, an order of default judgment was entered in defendant's case against the Waltmans which allowed defendant to add the cost of removal and disposal of tires and debris from the property to the delinquent tax roll for the property. Plaintiff filed a complaint against defendant on May

10, 1995, requesting injunctive relief from the lien and that the lien be permanently removed. Plaintiff filed a motion for summary disposition pursuant to MCR 2.116(C)(9) and (10) and defendant filed a response and a request for dismissal. The trial court granted defendant summary disposition and denied plaintiff's motion for summary disposition and subsequent motion for reconsideration. Plaintiff now appeals these rulings.

An option to purchase land is merely a preliminary contract which gives the holder of the option the privilege to purchase. *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 38; 257 NW2d 260 (1977). The holder of the option does not have an interest in the land before exercising the option. *Id.* The option is not a contract to purchase. *Id.* Rather, it is "an agreement by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *Id.* An option is only an offer and does not become a contract unless the terms of the option are strictly complied with. *Id.* The interest in the land attaches only when the conditions in the option are performed. *Id.* Failure to strictly comply with the terms of the option result in loss of the rights provided under the option. *Id.*

In this case, plaintiff never executed a purchase agreement of the property, but rather, brought a lawsuit on August 26, 1991, against the Waltmans, requesting that either the purchase price under the option be reduced or that the Waltmans remove the tires from the property. Because the parties never agreed to a purchase price, the document titled "Exercise of Option" could not be a contract to purchase land because it violated the statute of frauds. See MCL 566.106; MSA 26.906. Michigan case law has established that a writing transferring an interest in land must be certain and definite in order for it to comply with this statute. *In re Skotzke Estate*, 216 Mich App 247, 249; 548 NW2d 695 (1996). Generally, this has been interpreted to mean that the "parties, property, consideration and time of performance must be included." *Id.* Thus, the document titled "exercise of option" did not meet the statute of frauds and no contract for the sale of property existed as a consequence of the option. Therefore, plaintiff did not receive an interest in the property until it received the warranty deed on December 11, 1992, from Tanski.

To qualify for the protections of Michigan's recording acts, a person must either have a prior conveyance that is first recorded or be a bona fide purchaser. A bona fide purchaser is a purchaser in good faith, who paid valuable consideration, who did not have notice of a prior interest and who duly recorded the conveyance. MCL 565.29; MSA 26.547; *Kastle v Clemons*, 330 Mich 28; 46 NW2d 450 (1951). "A good-faith purchaser is one who purchases without notice of a defect in the vendor's title." *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 297; 537 NW2d 258 (1995), citing *Michigan Nat'l Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992). This Court has defined "notice of a defect" as follows:

> Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property. [*Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995);

quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).]

A notice of lis pendens is effective as constructive notice from the time of its recording. *Attorney General v Ankersen*, 148 Mich App 524; 385 NW2d 658 (1986).

We find that plaintiff was not a good faith purchaser of the property. Plaintiff indicated in its August 26, 1991, complaint against the Waltmans that it was aware that "the record of title disclosed a lawsuit filed in this court by the City of Auburn Hills" regarding zoning violations and health hazards on the property. Defendant filed a lis pendens on October 28, 1992, regarding the lawsuit it had brought against the Waltmans on August 13, 1992. Plaintiff had both constructive and actual knowledge of defendant's claim regarding the property well before it purchased the warranty deed on December 11, 1992. Therefore, plaintiff cannot be a good faith purchaser under Michigan's race-notice statute, MCL 565.29; MSA 26.547.

Under the circumstances of this case, we do not believe that the trial court clearly erred in ruling that plaintiff had constructive notice of the pending nuisance action before purchasing any interest in the property and therefore took the property subject to the existing rights and equities. Therefore, the grant of summary disposition for defendant pursuant to MCR 2.116(C)(10) was proper because no genuine fact existed regarding whether plaintiff had notice of the nuisance suit before obtaining an interest in the property. Moreover, because defendant pleaded numerous defenses to plaintiff's allegations, including plaintiff's prior knowledge of the pending nuisance action which prevented plaintiff from being a bona fide purchaser, it is clear that defendant did state a defense sufficient to withstand plaintiff's motion for summary disposition pursuant to MCR 2.119(C)(9).

Next, plaintiff argues that the court erred in denying its motion for leave to file an amended complaint. A court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). Amendment is generally a matter of right rather than grace, and should ordinarily be denied only for particularized reasons, such as undue prejudice to the opposing party, undue delay, bad faith or dilatory motive on the movant's part, or where the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

The trial court found that the allegation plaintiff proposed to include in its complaint would be futile and thus denied leave to amend. We agree with the trial court. Plaintiff argued that it should be granted leave to amend its complaint to include the allegation that it had exercised its option to purchase and, thus, had a recorded interest in the property in May 1991, which preceded defendant's affidavit relative to the pending lawsuit. However, although a document was executed by plaintiff and directed to the Waltmans, as previously discussed, this document did not make plaintiff a bona fide purchaser. Therefore, because amendment would be futile, the trial court did not abuse its discretion in denying plaintiff's request to amend its complaint.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie