THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0036, Winecellar Farm, Inc. v. Estate of Eva Bedard, by its Executrix Carol Harriman, the court on December 29, 2008, issued the following order:

The petitioner, Winecellar Farm, Inc., appeals the dismissal of its petition against the Estate of Eva Bedard seeking specific performance of an alleged oral agreement to convey Bedard Farm to the petitioner. On appeal, the petitioner argues that the trial court erred in dismissing the petition because the facts alleged are sufficient to establish part performance, removing the oral agreement from the statute of frauds. We reverse and remand.

In reviewing a trial court's grant of a motion to dismiss, our standard of review is whether the allegations are reasonably susceptible of a construction that would permit recovery. In the Matter of Lemieux & Lemieux, 157 N.H. 370, 372 (2008). We assume the petitioner's pleadings to be true and construe all reasonable inferences in the light most favorable to the petitioner. Id. at 372-73. We then engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss. Id.

The trial court found the petitioner failed to state a claim upon which relief could be granted because there was no written agreement and the allegations were insufficient to show part performance evidencing an oral agreement. We disagree.

"The 'part performance' doctrine is a judicial device intended to prevent the terms of a formal statute from doing grave injustice." Greene v. McLeod, 156 N.H. 724, 728 (2008) (brackets omitted). This doctrine is frequently applied to oral contracts for the sale of real estate "where the purchaser has proceeded, either in performance or pursuance of the contract, so far to alter his or her position as to incur an unjust injury and loss." Id. (quotations and citations omitted).

To determine whether the part performance doctrine applies, we consider whether the acts are:

> (1) in pursuance of the contract and in reasonable reliance thereon, without notice that the defendant has already repudiated the contract; (2) such that the remedy of restitution is not

> reasonably adequate, making it very unjust for the defendant to hide behind the statute; and (3) one that is in some degree evidential of the existence of a contract and not readily explainable on any other ground.

Id. at 728-29 (quotations omitted).

Here, the allegations contained in the petition include the following: (1) Eva Bedard (together with her then living brother, Leo Bedard) orally agreed to sell Bedard Farm to the petitioner for its fair market value; (2) in reliance upon this oral agreement, the petitioner entered into two additional agreements with Ms. Bedard (the Haying and Pasturing Agreements) relating to activity the petitioner was to engage in on Bedard Farm; (3) in reliance upon the oral agreement, and pursuant to the Haying and Pasturing Agreements, the petitioner made numerous changes to portions of Bedard Farm at its expense and has ongoing haying and pasturing operations on Bedard Farm; (4) Ms. Bedard memorialized her intent to sell Bedard Farm to the petitioner in a 2006 purchase and sale agreement; and (5) under the purchase and sale agreement the petitioner agreed to pay, and has paid, $200 per month as consideration for the right to purchase the farm "in addition to the other consideration provided as part of the possession of the premises, clearing and pasturing, and maintenance."

The trial court ruled that these allegations were insufficient to support a claim of part performance, in part, because the petitioner's actions on Bedard Farm were conducted pursuant to agreements separate from the alleged oral agreement. The trial court's finding ignores the allegation that these agreements were executed in direct reliance upon the oral agreement, which the court was required to accept as true. Further, we have stated that a purchaser's possession or improvement of the disputed property may be evidence of part performance. See Greene, 156 N.H. at 729. Thus, taking the petitioner's allegations as true, and construing all reasonable inferences in its favor, we conclude that the petitioner's actions on Bedard Farm could be sufficient to establish part performance.

The trial court also ruled that the allegations of the petitioner's monthly payments under the 2006 agreement were insufficient to establish part performance because the agreement under which they were made was a right of first refusal. We disagree. The right of first refusal "generally empowers its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser." Glick v. Chocorua Forestlands Ltd. P'ship, 157 N.H. 240, 247 (2008) (quotation omitted). There is no allegation contained in the

petition, nor any reference in the 2006 agreement, that the proposed sale was triggered by the involvement of a third party bona fide purchaser. Whether or not the 2006 agreement is a valid legal document, the issue here is whether the allegations contained in the petition are sufficient to make a claim of part performance. To that end, the 2006 agreement, or, more specifically, the payments made pursuant to it, may support the petitioner's claim of part performance. See, e.g., Greene, 156 N.H. at 729 (payment of monetary amounts in consideration of an oral contract may be considered as evidence of part performance).

Because we conclude that the petition is reasonably susceptible of a construction that would permit recovery, we need not address the petitioner's alternative argument.

Reversed and remanded.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

Eileen Fox,
Clerk