

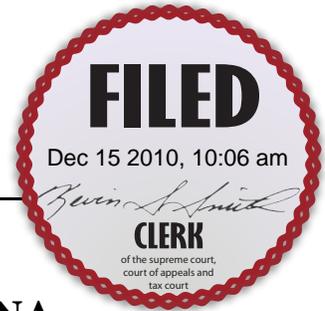
Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

BRUCE N. MUNSON
Muncie, Indiana

ATTORNEY FOR APPELLEE:

MARL L. ABRELL
Muncie, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

COLIP-RIGGIN CORPORATION,)
as assignee of Ronald D. Riggin,)

Appellant-Plaintiff,)

vs.)

REA RIGGIN & SONS, INC.,)

Appellee-Defendant.)

No. 18A04-1001-PL-13

APPEAL FROM THE DELAWARE CIRCUIT COURT NO. 4
The Honorable John M. Feick, Judge
Cause No. 18C04-0803-PL-23

December 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Plaintiff, Colip-Riggin Corporation (the Corporation), as assignee of Ronald D. Riggin (Ronald), appeals the trial court's order granting Appellee-Defendant's, Rea Riggin & Sons, Inc. (the Dairy), motion to dismiss.

We affirm.

ISSUE

The Corporation presents one issue for review which we restate as follows: Whether the trial court erred in granting the Dairy's motion for involuntary dismissal pursuant to Indiana Trial Rule 41(B).

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the trial court's judgment reveal that the Corporation is a closely held corporation organized and existing under the laws of the State of Indiana and wholly owned by Richard E. Riggin (Richard), Ronald's father. The Dairy is a closely held family corporation organized and existing under the laws of the State of Indiana and operating since the early 1900s as a dairy plant in Delaware County, Indiana.¹ This controversy arises from an amended complaint filed by the Corporation in October 2008 on behalf of Ronald alleging breach of contract and seeking approximately \$4.3 million as

¹ The Dairy was started by the family's patriarch, Rea Riggin, and was owned and operated by Rea and several family members, including sons Lloyd, Carl, Robert, and John. Although the record indicates Richard is also a son of Rea and was a stockholder in the family business, the extent of Richard's past participation in the daily operations of the Dairy is unclear.

payment for services rendered by Ronald to the Dairy from April 1989 through August 2007. In December 2009, the trial court conducted a two-day bench trial on the matter.

During the evidentiary hearing, the Corporation presented testimonial evidence through Richard and Ronald alleging several of the Dairy's officers and/or directors, including Lloyd Riggin (Lloyd), Carl Riggin (Carl), and Robert Riggin (Robert), had met with Richard in April 1989 and had made an oral agreement to hire Ronald as a mechanic and full-time security guard for the Dairy. Richard testified that, at the time of this alleged oral agreement, he informed Lloyd, Carl, and Robert that he was contemplating filing an adverse possession action concerning approximately thirty-four acres of land adjacent to the Dairy. Therefore, according to Richard, it was agreed that all compensation for Ronald's services, which was to be between \$10.00 and \$12.00 per hour, was to be deferred until such time as Richard failed to prevail on his adverse possession claim. In the alternative, it was allegedly agreed that should Richard prevail on his adverse possession claim, no money was to be paid to Ronald at all for his services. Richard did not immediately pursue his contemplated adverse possession claim, and in 2005 determined that he could not prevail on said claim.

Ronald also testified during the evidentiary hearing. Ronald informed the trial court that he moved a trailer into one of the outbuildings on the Dairy's premises in April 1989 and began living in the trailer while performing various services for the Dairy. These services included repair and maintenance of the Dairy's company vehicles, as well as grounds keeping and security services on the premises. Ronald further indicated that he never asked nor

received any compensation for his services until November 2007. However, Ronald admitted: (1) he never paid the Dairy any rent for living on the Dairy premises and continues to live there rent-free; (2) he held several additional jobs and worked full-time for Pepsi Beverages Company for approximately six years during his alleged full-time employment with the Dairy, making as much as \$50,000 per year; (3) the grounds of the Dairy which he was allegedly hired to maintain were currently a “holy mess;” and (4) over the years he occasionally conducted personal, for-profit business on the Dairy’s premises but never remitted any share of his proceeds for such activities to the Dairy. (Transcript p. 81).

Regarding the specific terms of the alleged oral agreement, Richard and Ronald both admitted that said agreement was never reduced to writing. Richard and Ronald also both acknowledged that Ronald was not present for the meeting and had no actual knowledge of any of the specific terms that were allegedly discussed and agreed upon. In addition, Richard and Ronald both acknowledged that all of the Dairy’s officers and/or directors who had allegedly attended the April 1989 meeting and agreed to the terms of Ronald’s employment are now deceased.²

At the conclusion of the Corporation’s case-in-chief, the Dairy made an oral motion for judgment on the evidence. In support of its motion, the Dairy argued that the underlying action was a “classic” example of the type of lawsuit specifically barred by Indiana’s Statute of Frauds. (Tr. p. 106). The Dairy also invoked the affirmative defenses of laches and

² Richard testified that a friend by the name of Stan Nossett had accompanied him to the April 1989 meeting as a witness. Nossett was unable to attend the evidentiary hearing in the underlying matter, however, due to medical problems.

equitable estoppels as an alternative bar to the litigation. The trial court took the matter under advisement, and on December 10, 2009, issued an order granting judgment in favor of the Dairy. In so doing, the trial court specifically found, among other things:

[D]ue to the absence of a written agreement and due to the fact that the agents of the party to be charged [the Dairy] are deceased, both affirmative defenses of laches and of the statute of frauds in this matter are valid and complete defenses for [the Dairy] and against [the Corporation] and the [Corporation] should recover nothing by way of its complaint.

(Appellant's App. p. 10).

The Corporation now brings this certified interlocutory appeal. Additional facts will be supplied as necessary.

DISCUSSION AND DECISION

The Corporation contends that the trial court erred in entering judgment in favor of the Dairy pursuant to Indiana Trial Rule 41. Specifically, the Corporation asserts that the "statute of fraud theory fails because the agreement in question was an agreement which may or may not have been performed within one year," and that certain equitable doctrines "remove" the matter from the statute of frauds." (Appellant's App. p. 4). In addition, the Corporation asserts that "[t]he laches theory fails for want of detrimental reliance by the corporation." (Appellant's App. p. 4).

Initially, we observe that this court's standard of review for cases involving a trial court's decision whether to grant or deny a motion for involuntary dismissal pursuant to Trial Rule 41(B) is well-settled. *Taflinger Farm v. Uhl*, 815 N.E.2d 1015, 1017 (Ind. Ct. App. 2004). In reviewing a motion for involuntary dismissal, we neither reweigh the evidence nor

judge witness credibility. *Id.* Rather, we consider only the evidence most favorable to the trial court's judgment and the reasonable inferences drawn therefrom. *Id.* Moreover, we will reverse the trial court only if the judgment is clearly erroneous, that is, if the evidence is not conflicting and points unerringly to a conclusion different from the one reached by the trial court. *Id.*

When trial is to the court, as it was here, the defendant may test the sufficiency of the plaintiff's evidence by moving for dismissal pursuant to Indiana Trial Rule 41(B). This rule provides that after a plaintiff or party with the burden of proof upon an issue has completed the presentation of evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief. *Id.* The court, as trier of the facts, may then determine them and render judgment against the plaintiff, or may decline to render any judgment until the close of all the evidence. *Id.*

Indiana's statute of frauds bars certain actions on promises, contracts, or agreements that are not placed in writing. *Wright v. Sampson*, 830 N.E.2d 1022, 1030 (Ind. Ct. App. 2005). Specifically, Indiana's statute of frauds provides, in pertinent part:

(b) A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based . . . is in writing and signed by the party against whom the action is brought or by the party's authorized agent:

* * *

(5) an action involving any agreement that is not to be performed within one (1) year from the making of the agreement.

Ind. Code § 32-21-1-1(b)(5). The statute of frauds is designed to preclude fraudulent claims which would probably arise when one person's word is pitted against that of another, to promote carefulness and exactness in commercial transactions, and to remove any temptation for perjury. *Ohio Valley Plastics, Inc. v. National City Bank*, 687 N.E.2d 260, 263 (Ind. Ct. App. 1997), *trans. denied*. Moreover, the statute of frauds does not govern the formation of contracts, but rather governs the enforceability of contracts that have already been formed by making contracts or agreements that fall within its provisions unenforceable. *Lauer v. Raker*, 128 Ind.App. 264, 146 N.E.2d 116, 119 (Ind. Ct. App. 1957), *trans. denied*.

Here, in its order granting the Dairy's request for judgment on the evidence, the trial court found that "although [the Corporation] claims that an agreement was reached, there is no written document exhibiting any agreement between [the Dairy] and [Ronald]." (Appellant's App. p. 10). The court further found that Ronald "was not present at any meetings in which [Lloyd, Carl, Robert, and John] agreed to pay him any monies," that "with the exception of [Richard] and [Ronald], the other persons are deceased and had been deceased well before this litigation," and that "although [the Corporation] claims that an agreement was reached in April of 1989, no demand was made for any payment until November 22, 2007." (Appellant's App. p. 10). The trial court thereafter concluded that due to the absence of a written agreement and the fact that all of the Dairy's officers who were allegedly involved in the making of the oral agreement were now deceased, both the Indiana's Statute of Frauds and the affirmative defenses of laches "were valid and complete defenses" (Appellant's App. p. 10).

These findings are supported by clear and convincing evidence. During the evidentiary hearing, Richard and Robert both admitted that the alleged oral agreement between Richard and the Dairy regarding Ronald's services and payment thereof was never reduced to writing. Uncontroverted testimony further reveals that the oral agreement was not designed to be performed within one year of the making of the agreement, but rather was to continue indefinitely, or at least until such time as Richard prevailed on his contemplated adverse possession action. Therefore, Indiana's Statute of Frauds operates to bar enforcement of the alleged oral agreement, unless an exception exists to its application under the particular facts of this case. Not surprisingly, the Corporation asserts that various equitable principles, such as promissory estoppel, quasi-contract, and/or quantum meruit/unjust enrichment, operate to remove this particular matter from the statute of frauds. The Dairy counters, however, that the trial court correctly determined that these claims in equity were barred by the Dairy's affirmative defense of laches.

The doctrine of laches requires the establishment of three elements: (1) inexcusable delay in asserting a known right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. *SMDFund, Inc. v. Fort Wayne-Allen County Airport Authority*, 831 N.E.2d 725, 729 (Ind. 2005). In arguing that the trial court erroneously found that laches operated to bar its claim, the Corporation only challenges the Dairy's evidence as to the third element, stating "[m]ere inconvenience is insufficient to establish prejudice" and asserting that the Dairy failed to

present any evidence of a change in circumstances resulting in prejudice to the Dairy due to Ronald's delay in asserting his rights. (Appellant's Br. p. 6).

The record reveals that Ronald delayed in asserting his alleged rights for deferred compensation for approximately nineteen years, with no excuse for delay, and did not file the underlying cause of action until after all of the alleged makers of the oral agreement on behalf of the Dairy had died and thus were unable to refute either the existence or substance of said agreement. When questioned during the evidentiary hearing as to the reason for this delay, neither Richard nor Ronald could offer any explanation as to why Ronald did not attempt to assert his rights sooner. In addition, although Richard confirmed that he had determined he did not have a legitimate adverse possession claim to the property adjacent to the Dairy in 2005, neither he nor Ronald offered any explanation as to why Ronald delayed asserting his rights an additional two years until the Corporation, on behalf of Ronald, sent a demand letter to the Dairy in November 2007 seeking \$4,344,288.00 in deferred compensation.

Under these circumstances, the Dairy established that it would be prejudiced if this suit were allowed to proceed. Although the Corporation correctly points out that a mere lapse in time is insufficient to establish prejudice, laches may nevertheless operate to bar a claim where a party, with knowledge of the relevant facts, permits the passing of time to work a detrimental change in circumstances for the other party. *SMDFund, Inc.*, 831 N.E.2d at 731. Such is the case here. By remaining silent and permitting nearly two decades to pass before asserting his rights according to the alleged oral agreement until such time as all the

alleged makers of the agreement on behalf of the Dairy were deceased, Ronald, with full knowledge of the relevant facts, permitted the passage of time to work a detrimental change in circumstances for the Dairy. *See, e.g., Shafer v. Lambie*, 667 N.E.2d 226, 231 (Ind. Ct. App. 1996) (stating laches appeared to be viable defense where delay by plaintiff in asserting rights until after death of one of the parties deprived defendant of “valuable testimony” concerning relationship between the parties and the terms of alleged agreement); *see also Kirby v. State*, 821 N.E.2d 1097, 1100 (Ind. Ct. App. 2005) (concluding that for purposes of post-conviction laches, prejudice exists when unreasonable delay operates to materially diminish a reasonable likelihood of successful re-prosecution due to unavailable evidence and deceased witnesses, or witnesses who have no recollection of event), *trans. denied*. In sum, we conclude that the evidence most favorable to the trial court’s judgment supports its determination that both the affirmative defenses of laches and the statute of frauds operate as complete bars to the underlying action. We therefore find no error.

CONCLUSION

Based on the foregoing, we conclude that the trial court’s order granting the Dairy’s motion for judgment on the evidence, pursuant to Trial Rule 41(B), is supported by the evidence.

Affirmed.

BAILEY, J., and KIRSCH, J., concur.