RENDERED: November 24, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000718-MR

JAMES A. ELLIS & ASSOCIATES,
ARCHITECTS, PSC — APPELLANT

v. — APPEAL FROM PIKE CIRCUIT COURT
HONORABLE CHARLES E. LOWE, JR., JUDGE
ACTION NO. 95-CI-01674

THOMAS W. HUFFMAN
(D/B/A THE LANDMARK INN) — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, EMBERTON, AND MCANULTY, JUDGES.

EMBERTON, JUDGE. James A. Ellis & Associates, Architects, PSC appeals from an order of the Pike Circuit Court granting summary judgment to Thomas W. Huffman on a civil complaint based on the statute of limitations. Finding no error, we affirm.

James A. Ellis, the principal partner of Ellis & Associates, met with Richard Getty in August 1994, concerning Getty's possible legal representation of the architectural firm in collecting payment that was allegedly overdue for services rendered on several building contracts. Ellis asserted that the

firm was owed approximately $8,000,000 for architectural services the firm had provided involving construction on several school buildings in Pike, Floyd, and Martin Counties. Ellis also discussed with Getty a claim against Huffman for services the firm had rendered on projects involving The Landmark Inn, a hotel owned and operated by Huffman, in Pikeville, Kentucky.

After several months of evaluation, Getty filed a complaint on behalf of Ellis & Associates against Huffman on November 20, 1995, seeking $40,785 for reimbursable expenses and $27,000 in interest related to architectural services performed by Ellis & Associates. The complaint alleged that Ellis & Associates rendered valuable services "from the fall of 1985 through the fall of 1987 pertaining to blasting damage done to The Landmark Inn" and "from the winter or spring of 1988 through the fall of 1989 pertaining to the construction of convention facilities and additional rooms to The Landmark Inn." The complaint sought relief based on breach of contract and quantum meruit or unjust enrichment.

On December 20, 1995, Huffman filed an answer to the complaint admitting that Ellis & Associates performed architectural services related to blasting damage to The Landmark Inn, denying that Ellis had performed any architectural services involving the addition of rooms to the hotel, and pleading several affirmative defenses including statute of limitations.[1] Huffman also alleged that Ellis had received food, alcohol and

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[1] See generally Kentucky Rules of Civil Procedure (CR) 8.03.

the use of hotel rooms for political gatherings as payment on any amount owed to Ellis & Associates.

In March 1996, Huffman responded to eleven requests for admissions proposed by Ellis & Associates. Between April 1996 and March 1997, the parties took the depositions of Huffman on three occasions, Ellis on two occasions, Michael DeBourbon, Huffman's former attorney, and William Freebody, a musician who performed occasionally at The Landmark Inn.

In June 1996, Huffman filed a motion for summary judgment based on the five-year statute of limitations applicable to verbal contracts. The trial court assigned a hearing date of August 16, 1996, on the motion, but Huffman's counsel could not attend, so it was rescheduled for August 23, 1996. However, counsel for Ellis & Associates was not notified of the new hearing date and did not appear. On September 5, 1996, the trial court entered an order and opinion granting the motion for summary judgment.

On September 11, 1996, Ellis & Associates filed a motion to vacate the judgment or for leave to amend the complaint. On October 1, 1996, Huffman filed a response to the motion to vacate. Ellis & Associates' attorney filed a reply. On October 24, 1996, the trial court granted the motion to vacate and allowed appellant to amend the complaint. In the amended complaint, Ellis & Associates alleged that the parties had entered into an agreement for Huffman to pay $21,140 on the debt for services related to the blasting damage and $15,395 for past services and in addition to make payments for any further

services provided by the firm relating to construction of the convention center addition to the hotel. Appellant alleged that the agreement provided for payments of $2,000 per month on the $21,140 debt. The amended complaint included as an exhibit a handwritten document dated October 7, 1989, allegedly memorializing that agreement.

Shortly thereafter, Huffman filed a renewed motion for summary judgment based on the statute of limitations. That motion restated the arguments presented in the original motion. In November 1996, Ellis & Associates filed a memorandum in opposition to the motion admitting that the architectural services originally had been performed pursuant to verbal agreements, but arguing that the October 7, 1989, document created a written contract subject to the fifteen-year statute of limitations.[2] Appellant also contended that James Ellis was available for consultation on the convention center project until its completion on December 13, 1990, so any debt on that claim satisfied even a five-year limitations period. Finally, counsel maintained that Getty had delayed filing the complaint based on discussions with Huffman's attorney, and that Huffman should be estopped from asserting a statute of limitations defense. On December 12, 1996, Huffman filed a reply to the response.

On January 24, 1997, the trial court conducted a hearing on the renewed motion for summary judgment at which both parties were represented by counsel. On January 30, 1997, Ellis & Associates filed a post-hearing memorandum and a motion seeking

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[2] See Kentucky Revised Statutes (KRS) 413.090.

permission to file a second amended complaint. In the memorandum, appellant attempted to clarify the factual background of its claims. On January 30, 1997, Huffman filed a response to the post-hearing memorandum arguing that appellant was attempting to change his deposition testimony. Ellis & Associates filed a reply to the response.

On February 18, 1998, the trial court issued an order with findings of fact granting summary judgment to Huffman and holding that Ellis & Associates' claim was barred by the five-year statute of limitations applicable to contracts not in writing.[3] This appeal followed.

The standard of review on appeal where a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[4] The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible for the nonmoving party to produce evidence at trial warranting a judgment in his favor.[5] The moving party bears the initial burden of showing no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is

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[3] KRS 413.120(1).

[4] Scifres v. Kraft, Ky. App., 916 S.W.2d 779, 781 (1996); CR 56.03.

[5] Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 480-82 (1991).

a genuine issue of material fact for trial."[6] Whether an action is barred by the statute of limitations generally is a question of law decided by the courts.[7]

Here, James Ellis stated in his depositions that the services he rendered with respect to the blasting damage issue were completed on October 26, 1987, and with respect to the convention center addition on April 7, 1989. Huffman made several payments to Ellis, the last of which occurred in April 1989. Ellis stated in one of his depositions that sometime before November 19, 1990, Huffman stopped allowing him to charge food and beverages at The Landmark Inn, which was a part of the payment agreement.

Having reviewed the October 7, 1989, document, we agree with the trial court that the brief handwritten note does not contain sufficient terms to constitute a written contract for purposes of applying the fifteen-year statute of limitations.[8] Consequently, the five-year statute of limitations for oral contracts applied to the services provided to Huffman by Ellis & Associates.

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[6] Steelvest, 807 S.W.2d at 482.

[7] Cuppy v. General Accident Fire & Life Assurance Corp., Ky., 378 S.W.2d 629, 631 (1964). See generally Old Mason's Home of Kentucky, Inc. v. Mitchell, Ky. App., 892 S.W.2d 304 (1995).

[8] See, e.g., Mills v. McGaffee, 254 S.W.2d 716 (1953)(written instrument must include all its terms, the consideration for the undertaking, and the identities of the parties in order to constitute a contract in writing); Gray v. Int'l Ass'n of Heat and Frost Insulators and Asbestos Workers Local No. 51, 447 F.2d 1118 (6th Cir. 1971)(contracts partly oral and partly written or so indefinite as to require parole evidence are not "contracts in writing" within the fifteen-year statute of limitations).

Based on the entire record, we also agree with the circuit court that any cause of action on the contracts between the parties accrued prior to November 1990. Ellis & Associates' argument that its cause of action did not accrue until December 13, 1990, because the convention center addition project was not completed until it received final approval by the state building agency is unconvincing. Ellis performed no billable services after October 1989. Several months prior to November 1990, Ellis was notified that Huffman would provide no further compensation.

Finally, Ellis & Associates' argument that Huffman is estopped from asserting a statute of limitations defense or that the limitations period was tolled because of settlement negotiations is without merit. Richard Getty, appellant's former attorney, stated in an affidavit that he delayed filing a legal complaint at the request of Huffman's attorney in an attempt to settle the dispute. Ellis & Associates has presented no facts indicating that it was prevented from filing suit or that Huffman or his attorney obstructed appellant's ability to prosecute an action.[9]

Settlement negotiations between parties cannot be used to extend or toll the statute of limitations. In Burke v. Blair,[10] the court held that the defendant was not estopped from

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[9] See, e.g., KRS 413.190. See also Roman Catholic Diocese of Covington v. Secter, Ky., App., 966 S.W.2d 286, 290 (1998)("Obstruction might also occur where a defendant conceals a plaintiff's cause of action so that it could not be discovered by the exercise of ordinary diligence on the plaintiff's part.")

[10] Ky., 349 S.W.2d 836 (1961).

asserting a limitations bar because of actions by its attorney involving a possible settlement. It stated:

> The general rule is that a party may be estopped to plead limitations where he has induced inaction on the part of plaintiff by his false representations or fraudulent concealment. However, the fraudulent action must be of a character to prevent inquiry or elude an investigation or otherwise mislead the party having cause of action, and such party is under the duty to exercise reasonable care and diligence. . . .
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> It is not denied that the appellee knew when he discussed settlement with appellant's attorney that the attorney was working for his adversary. Mere negotiations looking toward an amicable settlement do not afford a basis for estoppel to plead limitations. (Citations omitted).[11]

In order to prevail on a theory of equitable estoppel, a party must prove the existence of both an intent of the estopped party to induce inaction and reasonable reliance by the party claiming the estoppel.[12] Ellis & Associates has presented no evidence that Huffman's attorney intended to mislead, obstruct, or conceal material information preventing appellant from filing its complaint or that appellant reasonably relied on any misconduct of appellee's attorney.

The trial court correctly held that Ellis & Associates' action was barred by the five-year statute of limitations.

The order of the Pike Circuit Court is affirmed.

ALL CONCUR.

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[11] Id. at 838.

[12] Garbor, 990 S.W.2d at 604.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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