

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001769-MR

SEMINARY WOODS, LLC

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE FREDERIC COWAN, JUDGE  
ACTION NO. 08-CI-010291

JEFFREY B. BROWN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: CAPERTON AND WINE, JUDGES, LAMBERT,<sup>1</sup> SENIOR JUDGE.

WINE, JUDGE: Seminary Woods, LLC appeals from a summary judgment of the Jefferson Circuit Court granting judgment and damages to Jeffrey B. Brown for breach of contract for the purchase of a condominium. Seminary Woods argues that there were issues of fact concerning whether Brown waived the “time-is-of-the-essence” and completion date provisions of the contract, both orally and by his

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<sup>1</sup> Senior Judge Joseph E. Lambert, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

conduct. Kentucky law does not clearly allow enforcement of an oral waiver to the writing requirement of the Statute of Frauds, and Seminary Woods has not alleged sufficient facts which would warrant a finding of waiver in this case. Hence, we affirm the trial court's grant of summary judgment to Brown.

The essential facts of this action are not in dispute. On June 13, 2005, Brown and Seminary Woods entered into a Condominium Sales Contract for the sale of Condominium Unit #1005 in the development known as Seminary Woods. The total purchase price was \$995,000.00, toward which Brown made a \$199,000.00 down payment. This down payment was to be held in escrow until closing when it would be applied to the purchase price. The Contract provided that construction and finish work on the unit would be substantially completed by December 31, 2006, and that closing would occur within thirty days from completion. The parties specifically agreed that "[t]ime is of the essence in this contract."

The unit was not substantially complete by December 31, 2006. In accord with the contract, on January 3, 2007, Brown mailed Seminary Woods a certified letter putting it on notice that it had sixty days to cure its breach. Seminary Woods did not substantially complete the unit within the contractual cure period. Furthermore, Seminary Woods was unable to refund Brown's deposit.<sup>2</sup>

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<sup>2</sup> The contract provided that Brown's deposit would be held in escrow at the Taylor County Bank in Campbellsville until construction financing was activated and construction commenced under that financing. According to Seminary Woods, Brown's deposit was removed from Taylor County Bank when it secured financing through National City Bank, and the funds were spent toward construction of the project. Seminary Woods also states that National City Bank refused to refund Brown's deposit, stating that it was not obligated to do so under the terms of its contract with Seminary Woods.

However, the parties set about negotiating with one another and with third parties, both orally and through e-mail, to pursue a number of alternate methods to complete the purchase. Brown explored obtaining additional financing on his own or through a separate entity. In addition, Seminary Woods produced an affidavit which avers that Brown orally stated his intention that he did not want to cancel the contract.

A certificate of occupancy was issued for the unit in March of 2008. Although the parties continued to discuss completion of the transaction and exchanged various draft agreements, the parties did not enter into any written agreement. Finally, on September 30, 2008, Brown mailed a letter to Seminary Woods which formally demanded a return of his down payment.

On October 1, 2008, Brown brought this action against Seminary Woods, alleging breach of contract and unjust enrichment. Thereafter, Brown filed a motion for summary judgment, arguing that there were no genuine issues of material fact and he was entitled to judgment as a matter of law. Seminary Woods opposed the motion asserting, among other things, that there were issues of fact concerning whether the parties modified the completion date or Brown waived timely performance of the contract.

On August 26, 2009, the trial court granted the motion for summary judgment. There was no dispute that Seminary Woods had breached the contract by failing timely to complete the unit and that Brown had given written notice demanding cure of the breach as required by the contract. The trial court also

found that the Statute of Frauds precluded Seminary Woods from arguing that there had been an oral modification of the contract, and that Brown's continued negotiation did not amount to a waiver of his rights under the contract. Thus, the trial court concluded as a matter of law that Brown was entitled to the return of his deposit. Seminary Woods now appeals.

The standard of review governing an appeal of a summary judgment is well settled. We must determine whether the trial court erred in concluding that there was no genuine issue as to any material fact and that the moving party was entitled to a judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Kentucky Rule of Civil Procedure ("CR") 56.03. In *Paintsville Hosp. Co. v. Rose*, 683 S.W.2d 255, 256 (Ky. 1985), the Supreme Court of Kentucky held that for summary judgment to be proper, the movant must show that the adverse party cannot prevail under any circumstances. The Court has also stated that "the proper function of summary judgment is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor." *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Because summary judgments involve no fact finding, this Court reviews them *de novo*, in the sense that we owe no

deference to the conclusions of the trial court. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In granting summary judgment for Brown, the trial court first noted that Seminary Woods clearly breached the Agreement by failing to substantially complete the unit by December 31, 2006 or within the sixty day cure period provided by the contract. On appeal, Seminary Woods concedes that its failure to complete the unit by that date or within the sixty day cure period amounts to a breach of the Agreement.<sup>3</sup> However, Seminary Woods argued that there were issues of fact concerning whether the parties orally agreed to modify the contract or to waive that provision.

The trial court rejected the former argument, pointing out that that the contract clearly falls within the Statute of Frauds, KRS 371.010(6), which precludes enforcement of any contract for the sale of real estate “unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent...” In addition, the Agreement in this case expressly provided that “[t]his Contract may not be amended, altered, or discharged except by another agreement in writing signed by each of the parties hereto”. Finally, the court also took note of the “time-is-of-the-essence” provision of the Agreement. Based on the Statute of Frauds and the express provisions of the Contract, the trial court concluded that any agreement to modify or extend the

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<sup>3</sup> Before the trial court, Seminary Woods argued that there was an issue of fact whether it had an obligation to substantially complete the unit by December 31, 2006.

completion date must be in writing. In the absence of any such writing, the trial court found that Seminary Woods could not introduce evidence of an oral agreement to modify the terms of the Contract.

Again, Seminary Woods now concedes that the Statute of Frauds and the Agreement would preclude enforcement of an oral agreement to modify the Contract. However, Seminary Woods contends that Brown waived enforcement of the Agreement, either orally or by his conduct. Seminary Woods points to Brown's alleged statement that he did not want to cancel the contract, and his subsequent conduct over a two-year period in negotiating with the developers to secure alternative financing and working with them to design the interior of the unit.

In rejecting this argument, the trial court noted that equitable estoppel is generally not an exception to the writing requirement of the Statute of Frauds. *Farmers Bank and Trust Co. of Georgetown, Kentucky v. Wilmott Hardwoods, Inc.*, 171 S.W.3d 4, 8 (Ky. 2005). Seminary Woods points out that the doctrines of waiver and equitable estoppel are not synonymous. Seminary Woods also cites a great deal of foreign and secondary authority holding that the defense of the statute of frauds may be waived, either orally or by conduct. *See, e.g., Canizaro v. Mobile Communications Corp. of America*, 655 So.2d 25 (Miss. 1995). *See also*, 13 *Williston on Contracts* §39:26 (4th ed.); 37 *CJS Frauds, Statute of* §168; and 73 *Am. Jur. 2d Frauds and Deceit* §480. This rule is also recognized in §150 of the *Restatement (Second) of Contracts*, which provides that where the parties to an

enforceable contract subsequently agree that all or part of a duty need not be performed or that all or part of a condition need not occur, the Statute of Frauds does not prevent enforcement of the subsequent agreement if reinstatement of the original terms would be unjust in view of a material change of position in reliance on the subsequent agreement.

Nevertheless, the Supreme Court noted that the application of the doctrine of equitable estoppel should be applied cautiously, with due regard to the legislature's enactment of the Statute of Frauds. *Farmers Bank*, 171 S.W.3d at 10. The Kentucky Supreme Court recently reiterated this point in *Sawyer v. Mills*, 295 S.W.3d 79, 90 (Ky. 2009). Although waiver is a distinct concept from estoppel, the *Restatement* view indicates that waiver is also an equitable remedy to enforcement of a contract governed by the Statute of Frauds. *Restatement (Second) of Contracts* §150 (1981).<sup>4</sup> Consequently, the reasoning of *Farmers Bank* limiting the application of equitable estoppel to the Statute of Frauds would also seem to apply to limit the application of the doctrine of waiver.

Furthermore, even if the doctrine of waiver does apply in this case, Seminary Woods has not alleged sufficient circumstances which would justify a

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<sup>4</sup> The comments to this section explicitly set out the requirement of reliance necessary to find a waiver. *See* Comment *b*. "To the extent that the waiver is acted on before it is revoked, it excuses the other party from performance of his own duty and of conditions of the duty of the waiving party."; Comment *c*. "Where an unenforceable modification of an enforceable contract operates as a waiver affecting an executory portion of the contract, the waiving party may retract the waiver by reasonable notification received by the other party. The original terms are then reinstated unless reinstatement would be unjust in view of a material change of position in reliance on the waiver."; and Comment *d*. "The change of position which prevents retraction of the waiver and reinstatement of the original terms may consist of action or forbearance, and may result from reliance either by the other party to the modifying agreement or by a beneficiary. But it must be a change of position in reliance on the modifying agreement, and it must be such that reinstatement of the original terms would be unjust. *See* § 84 on the effect of an extension of time by the party retracting a waiver. If the duty or condition would not have been performed in any event, or if there is a waiver of performance after a failure of performance, the failure is not in reliance on the modifying agreement."

finding that Brown waived his defenses under the Statute of Frauds. Indeed, Brown complied with his duties under the contract and Seminary Woods did not. Seminary Woods clearly breached the Agreement by failing to substantially complete the unit by the date specified in the contract or within the sixty day cure period. Brown sent the required written notice demanding that Seminary Woods cure the breach. When Seminary Woods did not complete the unit within the cure period, it notified Brown that it could not refund his deposit.

For purposes of the summary judgment motion, we must accept Seminary Woods's assertion that that Brown orally stated his intention to close the deal at some point in the future. However, Seminary Woods does not allege that it altered its position in reliance on Brown's statements or actions or that Brown received a benefit due to the delay. While the parties discussed a number of alternative arrangements, Seminary Woods does not contend that Brown accepted any of these proposals or that it took any action in reliance on Brown's oral statements or his silence. Consequently, we cannot find that Brown's continued negotiations in the eighteen month period following Seminary Woods's breach was sufficient to establish an enforceable waiver of the writing requirement of the Statute of Frauds. Therefore, the trial court properly granted summary judgment for Brown.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.



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