

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000152-MR

LORALEE TRIM

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE ERNESTO M. SCORSONE, JUDGE
ACTION NO. 08-CI-02093

MERV PROPERTIES, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND KELLER, JUDGES.

KELLER, JUDGE: Lorelee Trim (Trim) appeals from the trial court's summary judgment in favor of Merv Properties, LLC (Merv). On appeal, Trim argues that summary judgment was improper because there are material issues of fact regarding the terms of the agreement between the parties and application of the doctrines of promissory and equitable estoppel. Merv argues that the trial court properly granted summary judgment because the agreement alleged by Trim was

not in writing and therefore unenforceable. Having reviewed the record, we affirm.

FACTS

Merv is owned equally by its four members, Roberta Gonzalez (Gonzalez), Vivian Collins (Collins), Eric Friedlander (Friedlander), and Mark Properties, LLC (Mark). Howard Markowitz (Markowitz), Mark's manager, represents Mark's interest in Merv.

The owners of Merv founded the company for the purpose of purchasing a warehouse located at 1211 Manchester Street, Lexington, Kentucky. In that warehouse, Merv operates a monthly antique show called the Antique Affair (the Affairs). Vendors at the Affairs rent space for their booths from Merv on a month-to-month basis, paying in advance for each successive month. The Affairs are held the second weekend of each month, from Friday morning to Sunday afternoon; however, vendors are permitted to leave their merchandise in their booths throughout the month.

In the early fall of 2007, Gonzalez, Collins, and Trim had discussions regarding Trim operating a food service during the Affairs. Based on what she believed was their agreement, Trim purchased a food trailer, other equipment, and supplies at an estimated cost of \$25,000.00. Trim then put the food trailer in the food court area, which consisted of two booths, and paid \$500.00 per month in rent for that space.

Trim operated the food service at the Affairs from November 2007 until March 2008. During that period, Trim not only occupied the two booths that made up the food court, but also stored her supplies and placed a freezer in another part of the building. In March 2008, Collins gave Trim a document (the fourteen-day notice) stating that, among other things, Trim had to remove her belongings from the space she was not leasing, and she could not leave her freezer plugged in when the Affairs were not taking place. The document stated that, Trim either had to comply within fourteen days or leave the premises. Trim testified that she could not operate her business under those conditions so she vacated the premises.

Approximately six weeks later, Trim filed a complaint alleging that she had an agreement with Merv that provided that she would have the exclusive right to operate a food service during the Affairs for a period of two years; that she would pay \$500.00 per month in rent for the space she occupied; and that Merv would purchase her equipment and any remaining supplies from her at the end of the two-year period. Trim further alleged that Merv had breached that agreement, interfered with her business, and wrongfully removed her from the premises. Merv denied Trim's allegations but conceded that Trim had a month-to-month lease.

The parties conducted discovery and, in pertinent part, Trim took the depositions of Gonzalez, Collins, Friedlander, and Markowitz.¹ Collins, Friedlander, and Markowitz testified that they had not approved any agreement with Trim that varied from the usual month-to-month vendor lease. All three

¹ We note that Trim took depositions of two other witnesses; however, those witnesses did not have knowledge of what, if any, agreement Trim had with Merv. Therefore, we have not summarized them herein.

testified that Gonzalez would have been responsible for "recruiting" vendors and would have discussed any agreement with Trim. Gonzalez testified that she understood that Trim had the same lease arrangement as any other vendor.

Trim testified that Collins and Gonzalez approached her about operating the food court at the Affairs, and they agreed Trim would do so. Based on her understanding of the agreement, Trim borrowed \$25,000.00 to purchase a food trailer, equipment, and supplies. Trim admitted that there was no written agreement between the parties and that she could have prepared one. However, she did not do so because Gonzalez and Collins said they would.

Following discovery, Merv filed a motion for summary judgment, which the trial court granted. Trim then filed a motion to alter, amend, or vacate, which the court denied. It is from the court's judgment and order that Trim now appeals.

We set forth additional facts as necessary when addressing the issues raised on appeal.

STANDARD OF REVIEW

"The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law." *Pearson ex rel. Trent v. Nat'l Feeding Systems, Inc.*, 90 S.W.3d 46, 49 (Ky. 2002). With that standard in mind, we address the issues raised by Trim on appeal.

ANALYSIS

Kentucky Revised Statute (KRS) 371.010(6) and (7) provide that any lease for longer than a year and any agreement that will not be performed within a year must be in writing to be enforceable. Furthermore, KRS 355.2-201(1) provides that a contract for the sale of goods for a price of more than \$500.00 must be in writing to be enforceable. Because the impact of the preceding statutes on this matter is the same, we refer to them hereafter collectively as the Statute of Frauds.

Trim admits that the parties did not have a fully executed agreement setting forth the terms she alleges. However, she argues that there was sufficient evidence of an enforceable agreement to overcome Merv's motion for summary judgment. In support of her argument, Trim states that, when Merv provided her with the fourteen-day notice, it acted as if an agreement existed. Furthermore, Trim notes that she received an e-mail from Gonzalez indicating "that she had given additional space to [Trim] and that her partners were not pleased." According to Trim, the notice, the e-mail, and the parties' actions taken together prove the existence of an enforceable agreement.

Trim's argument misses the mark. Merv does not dispute that an agreement existed. However, the agreement Trim alleges involved a lease of more than one year and could not be performed within one year. Furthermore, the alleged buy-back provision was for goods valued at more than \$500.00. To be enforceable, that agreement had to be in writing. A writing sufficient to satisfy the statutory requirement must contain all of the elements of a contract. *Antle v. Haas*,

251 S.W.2d 290 (Ky. 1952). The e-mail Trim relies on references the additional space Trim occupied. The fourteen-day notice identifies the booths Trim occupied. However, neither document contains any other language that could be construed to evidence the alleged agreement. There is no mention of the amount of rent or the length of the leasehold. Furthermore, there is no mention of the alleged agreement by Merv to purchase the food trailer, equipment, and supplies. These documents, taken separately or together, do not constitute a writing sufficient to satisfy the requirements of the statute of frauds. Therefore, the alleged agreement is not enforceable.

We next address Trim's argument that the trial court erred when it did not apply the doctrines of equitable and promissory estoppel to impose an enforceable agreement on the parties. The elements of equitable estoppel are: (1) conduct, including acts, language, and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment. *Gray v. Jackson Purchase Production Credit Association*, 691 S.W.2d 904, 906 (Ky. App. 1985).

Trim argues that Collins and/or Gonzalez told her they would "buy her out" and she relied on their statement when she purchased the food trailer, equipment, and supplies. However, Trim testified that she was aware of the importance of a written agreement, an awareness borne out by an e-mail to

Gonzalez asking Gonzalez to prepare a written agreement. Trim also testified that she knew that one member could not bind Merv to a written agreement and that any such agreement needed approval of Merv's members. Therefore, Trim's argument fails for two reasons: (1) Merv had not approved the alleged agreement; and (2) Trim knew or should have known that Merv had not assented to the alleged agreement.

As to Trim's claim of promissory estoppel, the Supreme Court of Kentucky has stated that “the statute of frauds is not a bar to a fraud or promissory estoppel claim based on an oral promise of indefinite employment.” *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 471 (Ky. 1999). However, that statement was dicta as the decision in *Rickert* turned on the issue of equitable estoppel, not promissory estoppel. Furthermore, in *Sawyer v. Mills*, 295 S.W.3d 79, 90 (Ky. 2009), the Court stated all that can be deduced from *Rickert* is that the statute of frauds does not bar a fraud or promissory estoppel action in an employment case. The Court also noted that estoppel can only be used to overcome the statute of frauds in the most extreme cases because, to hold otherwise, would amount to amending the statute in violation of separation of powers. *Id.*

This is neither an employment case nor an extreme case; therefore, promissory estoppel is not applicable. Furthermore, even if promissory estoppel applied, Trim has not put forth evidence to support invocation of that doctrine. Promissory estoppel requires “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . and which

does induce such action or forbearance” *Meade Constr. Co. v. Mansfield Commercial Elec., Inc.*, 579 S.W.2d 105, 106 (Ky. 1979). As noted above, Trim failed to establish that Merv, the party against whom she seeks relief, assented to the alleged agreement. Therefore, even if it were available, she cannot rely on promissory estoppel for relief.

CONCLUSION

For the foregoing reasons, we affirm the trial court's summary judgment.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Justin R. Morgan
Lexington, Kentucky

BRIEF FOR APPELLEE:

William P. Thurman
Lexington, Kentucky