[Cite as *Saber Healthcare Group, L.L.C. v. Starkey*, 2010-Ohio-1778.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

Saber Healthcare Group, LLC	Court of Appeals No. H-09-022
Appellee	Trial Court No. CVH 20081045
v.	
Carol Y. Starkey	**DECISION AND JUDGMENT**
Appellant	Decided: April 23, 2010

* * * * *

Jonathan D. Greenberg and Morris L. Hawk, for appellee.

Daniel D. Mason, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal of a September 1, 2009 judgment of the Huron County Court of Common Pleas granting summary judgment in favor of appellee, Saber Healthcare Group, LLC ("Saber"), on its claim of unjust enrichment and dismissing the

counterclaim of appellant, Carol Y. Starkey. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} Appellee filed its complaint against appellant in the Huron County of Common Pleas on October 8, 2008, alleging breach of contract, unjust enrichment and fraud. All three counts sought a return of $35,500, which appellee gave to appellant between January 2005 and June 2005. Appellant filed a counterclaim on December 11, 2008, alleging that appellee breached an option to purchase real estate or, alternatively, breached a real estate purchase contract. Appellee filed a motion for summary judgment on July 23, 2009. On September 1, 2009, the trial court granted summary judgment in favor of appellee on its unjust enrichment claim and dismissed appellant's counterclaim.

{¶ 3} Appellant asserts two assignments of error on timely appeal:

{¶ 4} "FIRST ASSIGNMENT OF ERROR:

{¶ 5} "The Trial Court Erred in Granting Summary Judgment in Favor of Plaintiff on its Claim for Unjust Enrichment.

{¶ 6} "SECOND ASSIGNMENT OF ERROR:

{¶ 7} "The Trial Court Erred in Granting Summary Judgment Dismissing Defendant's Counterclaim."

{¶ 8} Appellee is a limited liability company with its principal place of business in Bedford Heights, Ohio. It operates and manages nursing homes and rehabilitation facilities in Ohio. Appellee runs the Twilight Gardens Home ("Twilight Gardens"), a nursing home located at 196 West Main Street in Norwalk, Ohio. Appellant owns a

house ("West Main property") located at 192 West Main Street, which abuts Twilight Gardens. The West Main property is the subject of this dispute.

{¶ 9} Certain facts in this case are undisputed. In 2004, appellee and appellant entered into negotiations concerning the sale and purchase of appellant's West Main property. The parties agreed on a price of $175,000 in early fall of 2004. The agreement, however, was not memorialized in a writing. Based on a verbal agreement, appellee issued, over a six-month period beginning in January 2005, four checks to appellant, the first three checks each in the amount of $2,500 and the final fourth check in the amount of $28,000, raising the total sum to $35,500 toward the West Main property. Appellant cashed all four checks and used a portion of the funds toward paying down the mortgage on the West Main property.

{¶ 10} In October 2005, appellee proffered a written purchase agreement to appellant for the West Main property. Appellant declined to sign the purchase agreement, which contained a provision characterizing the $35,500 as a down payment fully refundable in the event the transaction was not closed. The parties dispute whether payment of the $35,500 was in fact a refundable down payment or some sort of payment for an option to purchase the West Main property. The parties also dispute whether the written purchase agreement proffered by appellee formalized their verbal agreement.

{¶ 11} The standard of review of judgments granting motions for summary judgment is de novo; that is, an appellate court applies the same standard in determining

whether summary judgment should be granted as the trial court. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. Civ.R. 56(C) provides:

{¶ 12} "* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. * * *"

{¶ 13} Summary judgment is proper where the moving party demonstrates: "* * * (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

{¶ 14} Where a motion for summary judgment is made and supported by appropriate evidence showing the absence of a dispute of material fact, the burden shifts to the opposing party to present evidence showing the existence of a genuine issue of fact for trial: " * * * an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the

party does not so respond, summary judgment, if appropriate, shall be entered against the party." Civ.R. 56(E).

{¶ 15} In her first assignment of error, appellant asserts that the trial court improperly granted summary judgment for appellee on its unjust enrichment claim. In Ohio, unjust enrichment is a claim under quasi-contract law that arises out of the obligation arising by law as to a person in receipt of benefits that he is not justly and equitably entitled to retain. *Hummel v. Hummel* (1938), 133 Ohio St. 520, 527. Unjust enrichment entitles a party only to restitution of the reasonable value of the benefit conferred. *Sammartino v. Eiselstein*, 7th Dist. No. 08 MA 211**,** 2009-Ohio-2641, ¶ 14. The elements of an unjust enrichment claim are as follows: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment (i.e., the "unjust enrichment" element). *L & H Leasing Co. v. Dutton*, citing *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio St.3d 179, 183. See, also, *Sammartino* at ¶ 14.

{¶ 16} Here, appellee conferred a benefit on appellant when, without taking possession of the house, it paid her $35,500 toward the West Main property. Appellant knowingly received these funds, and used them toward paying down the mortgage on the West Main property she continued to possess. Appellant contends, however, that reasonable minds could not come to but one conclusion with respect to whether her retention of this benefit was unjust. Based on the equitable doctrine of part performance,

appellant maintains it would be manifestly unjust to return the entire sum of $35,500 to appellee.

{¶ 17} It is axiomatic that agreements for the sale of real estate come within the statute of frauds and must be in writing and signed by the party to be charged. R.C. 1335.05; *Shimko v. Marks* (1993), 91 Ohio App.3d 458, 461. Ohio's Statute of Frauds provides that "[n]o action shall be brought * * * upon a contract or sale of lands * * * or interest in or concerning them, * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith." R.C. 1335.05. Since both parties agree that there was no written and signed contract, the arrangement between them was presumptively unactionable under the statute of frauds.

{¶ 18} Nevertheless, Ohio courts have consistently recognized the doctrine of part performance as an exception to the statute of frauds. *Beaverpark Assoc. v. Larry Stein Realty Co.* (Aug. 30, 1995), 2d Dist. No. 14950. When applicable, this equitable doctrine operates to remove a contract from the operation of the statute of frauds. Id.

{¶ 19} The Ohio Supreme Court has held that equity "intervenes to render the statute of frauds inoperative only when a failure to enforce the contract will result in fraud and injury." *Tier v. Singrey* (1951), 154 Ohio St. 521, 526. Furthermore, "nothing can be regarded as a part performance to take a verbal [oral] contract out of the operation of the statute which does not place the party in a situation whereby he will be defrauded

unless the contract is executed." (Citations omitted.) *Delfino v. Paul Davies Chevrolet, Inc.* (1965), 2 Ohio St.2d 282, 288.

{¶ 20} Part performance is sufficient to remove a contract from the statute of frauds if the party that is relying on the agreement has undertaken "unequivocal acts * * * which are exclusively referable to the agreement and which have changed his position to his detriment and make it impossible or impractical to place the parties in statu quo." (Citations omitted.) *Delfino* at 287. Thus, a party seeking to establish part performance must demonstrate that he has performed acts in exclusive reliance on the oral contract, and that such acts have changed his position to his prejudice. *Geiger v. Geiger* (Nov. 16, 1993), 2d Dist. No. 13841.

{¶ 21} In this case, appellant asserts that she detrimentally relied on the verbal agreement with appellee by forfeiting the opportunity to place her property for sale on the open market. Appellant maintains that since then the housing market has fallen on hard times, and the lost opportunity to sell her property under significantly better market conditions constitutes a change of position to her prejudice. By persuading appellant to keep the West Main property off the market with advanced payments it now claims back, and clearly deriving the benefit of an option to purchase the West Main property in 2004 and 2005 at her expense, appellee injured appellant. Appellant thus contends she is entitled to retain money paid by appellee.

{¶ 22} We have carefully examined the transaction in this matter and must conclude that appellant's partial performance claim has not met the required burden of

proof for fraud and injury. In affidavits provided by appellant and her daughter-in-law, Cindy Starkey, appellant asserts the lost opportunity to sell the West Main property at a higher price under better market conditions. The West Main property, contracted with appellee for $175,000 in 2004, is today estimated at a value of $150,000. However, the record indicates that appellant never actually placed the West Main property on the open market, neither prior to the oral agreement with appellee nor at any point after the deal reached an impasse in October 2005. Hence, there lacks evidence to clearly and convincingly show that its purported part performance of keeping the West Main property off the market was "exclusively referable to the agreement" with appellee. Furthermore, appellant avers her reliance extended from 2004 through 2005 only "because we thought we had a deal with appellee in 2004, we did not put the house on the market for sale in 2004 or 2005." Yet appellant offers no evidence of the estimated drop in value of the West Main property by October 2005. Instead, appellant seeks damages for the difference between the value of the contract price of $175,000 and the current value of the property. Apparently, appellant seeks to hold appellee accountable for market declines well beyond the stated period of reliance.

{¶ 23} Moreover, appellant provides no evidence of having solicited a concrete offer for her property from any other prospective purchaser, neither in 2004 and 2005, nor at any later point in time to the present. Consequently, appellant has failed to show with the requisite clear and convincing evidence the existence of an actual opportunity to sell the West Main property at the higher price. As a result, appellant's alleged injury

remains speculative. Finally, in reliance on the oral agreement appellant paid down her mortgage with funds received by appellee to help clear title for sale to appellee. Yet such reliance, when coupled with her continued possession of the West Main property, must be viewed as a windfall rather than an injury or fraud. As a result, the doctrine of part performance is unavailable to take this oral contract out of the statute of frauds.

{¶ 24} Upon review, we find that appellee established its claim of unjust enrichment and the trial court did not err in granting summary judgment on this basis. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 25} In her second assignment of error, appellant asserts that the trial court erred in dismissing appellant's counterclaim alleging appellee breached an option to purchase real estate or, alternatively, breached a real estate purchase contract.

{¶ 26} Appellant contends that her oral agreement with appellee should not be defeated by the statute of frauds. In Ohio, however, it has long been well settled that mere payment of part of the purchase money of lands, there being no memorandum in writing of an agreement to sell, does not take the contract out of the statute of frauds. *Potts v. Potts* (1942), 72 Ohio App. 268, 273. As set forth infra, R.C. 1335.05 options to purchase real property also fall within the statute of frauds. *Stickney v. Tullis-Vermillion*, 165 Ohio App.3d 480, 2006-Ohio-842, ¶ 22, citing *Hubbard v. Dillingham*, 12th Dist. No. CA2002-02-045, 2003-Ohio-1443, ¶ 21 and *Ridge Stone Builders & Developers, Ltd. v. Gribbin*, 6th Dist. No. WD-03-009, 2003-Ohio-5188, ¶ 23. We therefore find that

appellee breached neither a contract nor an option contract for the purchase of appellant's West Main property. Appellant's second assignment of error is not well-taken.

{¶ 27} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay costs of this appeal pursuant of App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE