IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2013

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

HOWARD BROWNING,

Appellant,

v. Case No. 5D12-1823

LYNN ANNE POIRIER,

Appellee.

_____/

Opinion filed March 8, 2013.

Appeal from the Circuit Court
for Seminole County,
Alan A. Dickey, Judge.

Sean P. Sheppard of Sheppard Firm, P.A.,
Ft. Lauderdale, for Appellant.

Mark A. Sessums and Brian M. Monk of
Sessums Law Group, P.A., Lakeland, for
Appellee.

JACOBUS, J.

Appellant, Howard Browning, timely appeals a final judgment entered on a motion for directed verdict made by Appellee, Lynn Anne Poirier. We reverse.

Browning and Poirier lived together in a romantic relationship beginning in 1991. While the two were still co-habiting, Poirier purchased a winning lottery ticket for the July 4, 2007 drawing. Poirier won $1,000,000, but refused to share the winnings with Browning.

Browning brought suit against Poirier. His second amended complaint contained five counts, including claims for breach of contract and unjust enrichment.[1] The breach of contract count alleged that "in approximately 1993, [the parties] entered into an oral agreement in which they each agreed to purchase lottery tickets jointly on a frequent and regular basis, and to equally share in the proceeds of any winning lottery ticket(s)." The agreement was to apply whether the tickets were purchased "together, separately, in different locations, or at different times . . . ." The count further alleged that "[t]his agreement was capable of being performed within one (1) year" and that the agreement had been "reaffirmed and/or ratified several times orally and by the parties' conduct since 1993." In her answer, Poirier denied the existence of the contract, but raised the statute of frauds as an affirmative defense to the claim. She also contended that any derivative claims would be barred by the statute of frauds.

At trial, Browning testified that the parties first made an agreement to share any lottery winnings in 1992. He explained that "the agreement that we had since we were buying tickets that we would go in and buy them together and we would play together and that if we win, we would split the money." The agreement had most recently been reaffirmed in 1993, although Browning conceded that the agreement was to be effective only as long as they were in a romantic relationship and he had friendships with other women. He claimed that Poirier had purchased the winning ticket on the night of June 2, 2007, when they had stopped at the convenience store together to buy more tickets for the upcoming raffle; that he had given Poirier twenty dollars with which to purchase

[1] The remaining claims were waived by Browning prior to trial.

the ticket; and that they had both purchased tickets that night, but there was someone between them in line, because they wanted to purchase non-consecutive tickets.

At the close of Browning's case, the trial court granted a directed verdict on the claim for breach of contract, finding that the action was barred by the statute of frauds because it was not in writing as required for a contract "not to be performed within the space of 1 year from the making thereof. . . ." See § 725.01, Fla. Stat. (2007). The trial court also granted a directed verdict on Browning's claim for unjust enrichment, holding that a party seeking to enforce an express contract cannot simultaneously disavow the contract and seek equitable relief in quasi-contract. Final judgment was then entered in favor of Poirier.

The threshold issue presented by this case is whether Browning's action is barred by the statute of frauds. We hold that it is not. The statute provides in relevant part that:

> No action shall be brought . . . upon any agreement that is not to be performed within the space of 1 year from the making thereof . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

Id.

The general rule is that the statute of frauds bars enforcement of oral contracts which by their terms are not to be performed within a year. Yates v. Ball, 181 So. 341, 344 (Fla. 1937). The fact that a contract may not be performed within a year does not bring it within the statute. Id. "In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." Id.

Contracts for an indefinite period generally do not fall within the statute of frauds. Id.; Restatement (Second) of Contracts § 130 cmt. (a) (1981) ("Contracts of uncertain duration are simply excluded; the provision covers only those contracts whose performance cannot possibly be completed within a year."). As the court explained in Yates:

> When, as in this case, no definite time was fixed by the parties for the performance of their agreement, and there is nothing in its terms to show that it could not be performed within a year according to its intent and the understanding of the parties, it should not be construed as being within the statute of frauds. 25 R.C.L. 456, and cases cited. 25 R.C.L. 458.

Id. at 344. However, the general rule is subject to a "qualifying rule" that:

> when no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year.

Id.

In arguing that enforcement of the contract was barred by the statute, Poirier relies on the qualifying rule outlined in Yates. She contends that parties did not intend for the agreement to be fully performed within one year as it was a "perpetual" agreement with no termination date. The flaw in her argument is the assumption that the agreement was intended to be "perpetual." It was simply an agreement for an indefinite term which, according to Browning's testimony, was to continue as long as the parties were involved in a romantic relationship. Although the parties contemplated that the relationship would last more than one year, there was nothing in the agreement, which was terminable at will, to show that it could not be performed within one year, or

which required performance for a period of time exceeding one year. Hence, Browning's suit for breach of contract is not barred by the statute. See, e.g., Wilcox v. Lang Equities, Inc., 588 So. 2d 318 (Fla. 3d DCA 1991) (holding that statute of frauds did not bar action by hotel owner to enforce agreement pursuant to which corporation was to sell vacation packages and to remit hotel fees to hotel owner, although agreement lasted more than a year and was for indefinite period; agreement was not within the statute of frauds because no definite time was fixed for performance and there was nothing in the terms to show that it could not be performed within one year); Gulf Solar, Inc. v. Westfall, 447 So. 2d 363 (Fla. 2d DCA 1984) (holding that statute of frauds did not bar action by employee under oral at will employment contract although parties contemplated employment would last more than one year); Hope v. National Airlines, 99 So. 2d 244 (Fla. 3d DCA 1957) (recognizing that oral contract that employee would be employed as long as corporation was in business is generally not barred by the statute of frauds); Restatement (Second) of Contracts § 130 Illus. BB R3.4 (1981) (stating that contract that A will provide grading and B will construct a switch and maintain it as long as A needs it for shipping purposes is not barred by the statute of frauds, although A uses switch for 15 years); see also McGehee v. South Carolina Power Co., 196 S.E. 538 (S.C. 1938) (recognizing that use of the word "indefinite" does not mean perpetually, but means uncertain as to time). The contract at issue is similar to, if not indistinguishable from, those involved in employment cases in which an employee is hired for an indefinite period. The employment contracts are considered terminable at will by either party and are enforceable although not in writing because the contracts do not fall within the statute of frauds. See, e.g., Richey v. Modular Designs,

Inc., 879 So. 2d 665 (Fla. 1st DCA 2004) (concluding that statute of frauds did not bar recovery because salaried employee's contract was terminable at will, with indefinite duration; his claim was for commissions earned for past services and there was no evidence contract was intended to last beyond one year); Cabanas v. Womack & Bass, P.A., 706 So. 2d 68 (Fla. 3d DCA 1998) (finding that statute of frauds did not bar claim for breach of oral employment contract for indefinite time, that was terminable at will by either party, which had been fully performed by employee, where employee was hired for work that did not require his performance beyond one year).

The cases cited by Poirier are distinguishable. They involve mostly business contracts in which the intended term of performance, while indefinite, was plainly more than one year. See, e.g., LynkUs Commc'ns, Inc. v. WebMD Corp., 965 So. 2d 1161 (Fla. 2d DCA 2007) (holding that oral agreement to establish new business to continue indefinitely is barred by the statute of frauds); Ballard-Cannon Dev. Corp. v. Sandman Prop. and Dev., LLC, 933 So. 2d 1251 (Fla. 1st DCA 2006) (holding that action on development contract was barred by statute of frauds, where developer's own witnesses acknowledged that development of project would take well over a year to complete); Hosp. Corp. of Am. v. Assocs. in Adolescent Psychiatry, 605 So. 2d 556 (Fla. 4th DCA 1992) (holding that oral agreement to operate joint venture for a period of fifteen years was barred by the statute of frauds, although it was conditioned on obtaining certificate of need); Khawly v. Reboul, 488 So. 2d 856 (Fla. 3d DCA 1986) (holding that oral agreement to form corporation and operate sportswear business was barred by the statute of frauds, as parties intended business to continue for more than one year); Weinsier v. Soffer, 358 So. 2d 61 (Fla. 3d DCA 1978) (holding that oral

agreement to enter into business and share losses in ongoing business that was to continue indefinitely was barred by the statute of frauds); Food Fair Stores, Inc. v. Vanguard Invs. Co. Ltd., 298 So. 2d 515 (Fla. 3d DCA 1974) (holding that parties to oral agreement with grocery chain were not allowed to enforce oral agreement which provided that any future stores of particular chain built in the Bahamas would be operated jointly by the parties, because contract was not to be performed within one year and thus came within the statute of frauds).

The line distinguishing these types of cases can sometimes be unclear. However, we are confident that the oral contract in this case is not barred by the statute of frauds because there is no evidence the contract (as opposed to the relationship) was intended to last for a period of more than a year. Moreover, we reverse the directed verdict on this count because the evidence, viewed in a light most favorable to Browning, could sustain a verdict in favor of Browning. See Beneitz v. Joseph Trucking, Inc., 68 So. 3d 428, 429 (Fla. 5th DCA 2011) ("A motion for directed verdict should be granted only where there is no reasonable evidence upon which a jury could legally predicate a verdict in favor of the moving party.").

We also reverse the dismissal of Browning's count for unjust enrichment. The trial court dismissed this count on the basis of Tobin & Tobin Ins. Agency, Inc. v. Zeskind, 315 So. 2d 518 (Fla. 3d DCA 1975). Logically, a party whose contract is unenforceable due to the statute of frauds cannot recover for unjust enrichment, as the law will not imply a contract where an express contract exists regarding the same subject matter. Kovtan v. Fredericksen, 449 So. 2d 1, 1 (Fla. 2d DCA 1984). Thus, once it is shown that an express contract exists, the claim for unjust enrichment

necessarily fails. Real Estate Value Co. Inc. v. Carnival Corp., 92 So. 3d 255, 262 n.2 (Fla. 3d DCA 2012). Here, however, Poirier denied the existence of an express contract and the jury has yet to determine whether an express contract exists. Under these circumstances, the two claims can be maintained simultaneously. Id., ThunderWave, Inc. v. Carnival Corp., 954 F.Supp. 1562, 1566 (S.D. Fla. 1997) (citing Hazen v. Cobb-Vaughan Motor Co., 117 So. 853, 857-58 (Fla. 1928)).

REVERSED and REMANDED.

TORPY, J., concurs.
SAWAYA, J., concurs in part, dissents in part, with opinion.

SAWAYA, J., concurring in part, dissenting in part. Case No. 5D12-1823

This case involves two romantically involved individuals who allegedly agreed to split the proceeds of any lottery tickets they purchased, only to have the eventual winning ticket split their romance. The purchaser of the winning ticket is Lynn Anne Poirier, the Appellee. The claimant of half of the proceeds is Howard Browning, the Appellant. Browning testified at trial that he and Poirier became romantically involved in 1991 and started living together that year. He further testified that in 1993, they entered into an oral agreement to split the proceeds of any lottery tickets they may purchase and that this agreement was to last as long as they remained romantically involved. Some fourteen years after the alleged agreement was made and while the parties were still romantically involved and living together, Poirier purchased the winning ticket, collected one million dollars, and refused Browning's request for half of the proceeds. The displeased and disgruntled Browning then filed the underlying suit for breach of contract and unjust enrichment seeking half of the proceeds. Poirier denied the existence of any oral agreement to split future lottery proceeds and interposed the defense of the statute of frauds. The trial court directed a verdict in favor of Poirier concluding that if there was an oral agreement, Browning's claim is barred because the parties intended it to last for far longer than one year. Browning appeals, arguing that factual issues remain that should be resolved by a jury and asks us to reverse the judgment in favor of Poirier and remand this case for a new trial.

The majority holds that the alleged oral contract to share lottery winnings is not barred by the statute of frauds and remands for a new trial only on the issue of whether

the oral agreement was entered into by the parties.[2] That holding is based on reasoning that it was possible that the alleged oral contract could have been performed within the statutory one-year performance period and, therefore, the statute does not apply to bar the claim for breach of the agreement. I believe the key factor to determine the applicability of the statute to this alleged oral contract which, as the majority concedes, is for an indefinite period of time, is whether the parties intended that the contract extend beyond the one-year statutory period. What the parties intended is a question that should be left to the jury to resolve.

The statute of frauds is found in section 725.01, Florida Statutes (2007), and provides in pertinent part:

> No action shall be brought . . . upon any agreement that is not to be performed within the space of 1 year from the making thereof . . . unless the agreement or promise upon which such action shall be brought, or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or by some other person by her or him thereunto lawfully authorized.

The courts have consistently applied the rule that when an alleged oral contract is for an indefinite period of time, the determining factor is whether the parties intended the contract to extend beyond the one year statutory period. In Yates v. Ball, 181 So. 341 (Fla. 1937), the court explained:

> [W]hen no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year.

[2] On remand, the unjust enrichment count of Browning's complaint will also be resolved.

Id. at 344. In Lundstrom Realty Advisors, Inc. v. Schickedanz Bros.-Riviera Ltd., 856 So. 2d 1117 (Fla. 4th DCA 2003), the court explained that this holding in Yates specifically means that "[w]hen an oral agreement is silent as to time, yet capable of performance within one year, the parties' intent will control to determine whether the statute of frauds bars enforcement . . . ." Id. at 1122 (quoting Yates). In Khawly v. Reboul, 488 So. 2d 856, 858 (Fla. 3d DCA 1986), the court interpreted the holding in Yates to mean that "to determine whether the statute of frauds bars enforcement of an oral contract on the ground that it is not to be performed within one year, we look to the intent of the parties." Id. at 858. Similarly, in Hospital Corp. of America v. Associates In Adolescent Psychiatry, S.C., 605 So. 2d 556 (Fla. 4th DCA 1992), the court explained:

> In Yates v. Ball, 132 Fla. 132, 181 So. 341 (1937) the court noted: "To make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made." Id. at 139, 181 So. 341. Yates establishes that the intent of the parties is determinative with regard to the question of whether the contract is to be performed within one year.

Id. at 557.

The courts have construed the statutory language found in section 725.01 "not to be performed within the space of one year" to refer to the express intent of the parties at the time they make the oral contract. See Lundstrom Realty Advisors, Inc., 856 So. 2d at 1122 ("[T]o be within, and thus barred by, the provision in the statute of frauds concerning agreements 'not to be performed within the space of one year from the making thereof,' it must be shown that neither party's performance was intended to be complete within one year."); Hertz v. Salman, 718 So. 2d 942, 942 (Fla. 3d DCA 1998) ("The record supports the trial court's finding that the parties intended that the oral agreement was 'not to be performed within the space of 1 year from the making

thereof.'" (quoting section 725.01)); Fla. Pottery Stores of Panama City, Inc. v. Am. Nat'l Bank, 578 So. 2d 801, 804 (Fla. 1st DCA 1991) ("To be within, and thus barred by, the provision in the statute of frauds concerning agreements 'not to be performed within the space of one year from the making thereof,' it must be shown that neither party's performance was intended to be complete within one year."); see also 27 Fla. Jur. 2d Statute of Frauds § 16 (2013) ("The statutory language 'not to be performed within the space of one year from the making thereof' has been construed as referring to the expressed intention and expectation of the parties at the time they contract, and subjection to the statute is not determined by the time circumstance attending the actual performance. Thus, the primary factor in determining whether an oral contract is to be performed within the one-year limitation is the intent of the parties at the time the agreement is made." (footnotes omitted)).

Therefore, when an oral contract is for an indefinite period, the court must determine whether it was the intent of the parties that the contract be fully performed within one year. The district courts have consistently followed this rule. See LaRue v. Kalex Constr. & Dev., Inc., 97 So. 3d 251, 255 (Fla. 3d DCA 2012) ("The intent of the parties is a determinative factor."); Tydir v. Williams, 89 So. 3d 1129, 1132 (Fla. 1st DCA 2012) (holding that the intent of the parties is determinative when deciding whether an oral contract is to be performed within the year limitation period of the statue of frauds); Aspsoft, Inc. v. WebClay, 983 So. 2d 761, 769 (Fla. 5th DCA 2008) ("Here, neither the amended complaint nor any of the affidavits demonstrate an intent on the part of the parties that the computer consulting work would not have been completed within one year of the date of the contract. As such, the General Magistrate erred in

recommending dismissal of count I based on a violation of Florida's Statute of Frauds."); Fla. Pottery Stores of Panama City, Inc., 578 So. 2d at 804; Monogram Prods., Inc. v. Berkowitz, 392 So. 2d 1353, 1355 (Fla. 2d DCA 1981) ("Where, as here, an oral contract is at issue, the Statute of Frauds does not bar enforcement of that contract if the parties intended for it to be performed within one year."); First Realty Inv. Corp. v. Gallaher, 345 So. 2d 1088, 1089 (Fla. 3d DCA 1977) ("The primary factor to be utilized in determining whether or not an oral contract is to be performed within the one year limitation of the statute is, of course, the intent of the parties.").

The intent of the parties is a fact question that should be resolved by the finder of fact. See Lundstrom Realty Advisors, Inc., 856 So. 2d at 1122 ("On remand, the finder of fact must determine, 'from the object to be accomplished' by the agreement and the 'surrounding circumstances,' whether the parties intended that the agreement was not to be performed within the space of one year." (citing Yates and § 725.01, Fla. Stat.)); Collier v. Brooks, 632 So. 2d 149, 157-58 (Fla. 1st DCA 1994) ("The parties have taken opposing positions regarding the time in which the agreement was to have been performed and summary judgment is precluded by this factual dispute, the resolution of which will determine whether section 725.01 bars Collier's damages claim for breach of contract." (footnotes omitted)); Fla. Pottery Stores of Panama City, Inc., 578 So. 2d at 804 ("Since it appears that a factual issue existed concerning the parties' intent to secure participation within one year, summary judgment based upon the statute of frauds should not have been granted."); Venditti-Siravo, Inc. v. City of Hollywood, Fla., 418 So. 2d 1251, 1253 (Fla. 4th DCA 1982) ("However, if by its terms it is capable of performance within one year, with the intention of the party (a fact issue) being the

primary factor, it is not within the Statute."); Monogram Prods., Inc., 392 So. 2d at 1355 ("From the pleadings, affidavits and depositions, it appears that a factual issue existed as to the intent of the parties as to whether coverage should be procured immediately . . . ."); see also City of W. Palm Beach v. Stevens, 408 So. 2d 698, 699-700 (Fla. 1st DCA 1982) ("Although intent may be inferred from the surrounding circumstances such as the conduct of the parties, cf. Smart v. Brownlee, 195 So. 2d 4 (Fla. 4th DCA 1967), it is a question for the trier of fact.").

In resolving the issue of intent, consideration should be given to the object to be accomplished and the surrounding circumstances. See LynkUs Commc'ns, Inc. v. WebMD Corp., 965 So. 2d 1161, 1165 (Fla. 2d DCA 2007) ("In the instant case, it is clear 'from the object to be accomplished . . . and the surrounding circumstances' that the agreement alleged by LynkUs was intended to 'extend for a longer period than a year.'" (quoting Yates)); see also Tydir, 89 So. 3d at 1131 ("In LynkUs, the Second District Court of Appeal concluded it was 'clear from the object to be accomplished . . . and the surrounding circumstances' that the agreement between the parties at issue was intended to extend for longer than one year. Id. (quoting Yates, 181 So. at 344)."); Collier, 632 So. 2d at 158 ("On remand, the trial court must determine, 'from the object to be accomplished' by the agreement and the surrounding circumstances, whether 'it clearly appears that the parties intended that it should extend for a longer period than a year.'" (quoting Yates, 181 So. at 344)).

The object to be accomplished was to win the lottery. The circumstances surrounding the alleged oral agreement was that it would last for as long as the parties remained romantically involved. The record reveals that the romantic relationship lasted

many years after the date the agreement was allegedly made and that is a factor that can be considered in determining what the parties intended at the time the agreement was made. See Viscito v. Fred S. Carbon Co., Inc., 717 So. 2d 586, 587 (Fla. 4th DCA 1998) ("The fact is undisputed that the parties' oral agreement created a business relationship that lasted over an extended and indefinite period of time. Under the agreement, Carbon had the right to terminate the relationship at any time, and, in fact, did. As such, we believe the trial court correctly concluded that enforcement of the agreement was barred by the Statute of Frauds."); Rafael J. Roca, P.A. v. Lytal & Reiter, Clark, Roca, Fountain & Williams, 856 So. 2d 1, 5 (Fla. 4th DCA 2003) ("[T]he jury was free to look to the subsequent conduct of the parties to ascertain the parties' intent and the agreement's meaning."); Smart v. Brownlee, 195 So. 2d 4, 5 (Fla. 4th DCA 1967) ("'Intention', as the term is used in connection with contracting parties, is an operation of the mind, which, when not clearly expressed, may be demonstrated by conduct.").

The majority applies the "possible" principle reasoning that it was possible that one of the parties would win the lottery and they would end their relationship within the year performance period. Appellant goes so far as to argue that it was possible that the agreement "could have been completed within 1 year based on the fact that either party could have died during the year . . . ." In Hesston Corp. v. Roche, 599 So. 2d 148, 153 (Fla. 5th DCA 1992), this court explained that even if it is possible to perform an alleged oral contract within one year, it must be shown that the parties intended and expected performance within the year. This court stated:

> Similarly, in All Brand Importers, Inc. v. Tampa Crown Distributors, Inc., 864 F.2d 748, 750 (11th Cir. 1989), a recent case applying Florida law, the

> Eleventh Circuit Court of Appeals applied the statute of frauds to an oral distributorship agreement of indefinite duration ("as long as Tampa Crown did a good job, its sales continued to grow . . .") that could have been terminated earlier than one year because the evidence showed the parties intended the contractual relationship would last more than one year. See Yates, 181 So. at 344 (where a contract is susceptible of performance within a year *and* the evidence shows that it was expected to have been performed within that time, it is not within the statute of frauds).

Id. (emphasis in original); see also LaRue, 97 So. 3d at 255 ("Therefore, when an agreement is 'susceptible of performance within a year, and the evidence shows that it was expected to have been performed within that time,' it is not barred by the statute of frauds." (quoting Yates, 181 So. at 344)). Hosp. Corp. of Am., 605 So. 22 at 557.

Hence, if it was possible to perform the alleged oral agreement in one year, there is no evidence that the parties intended or expected that. To the contrary, it does not take an advanced degree in statistics or mathematics to know that the odds of winning the lottery are very slim and the odds of winning it within a year period are even slimmer. I think it stretches the "possible" principle too far to suggest that two people would enter into an agreement to split lottery winnings intending that they would both win and end their relationship either voluntarily or by death within the year period. At least death is an eventual certainty and the only question is when it will happen. Winning the lottery is an improbability and the only question is whether that will ever happen. I believe that applying the "possible" principle to this case offends the admonition enunciated in Yates and many other cases that "[t]he statute should be strictly construed to prevent the fraud it was designed to correct, and so long as it can be made to effectuate this purpose, courts should be reluctant to take cases from its protection." Yates, 181 So. at 344.

The majority remands this case for trial so the jury can decide whether the parties entered into the alleged oral agreement. I think that in order to determine whether the alleged oral agreement was made, the jury will have to determine the terms and conditions of the alleged agreement, including what the parties intended the duration of the agreement to be. Unlike the majority, I believe those findings should determine whether the statute of frauds applies in the instant case. Finally, I would note that even Appellant requests remand for trial so the jury can decide whether the agreement was entered into and whether the parties intended it to extend beyond the year period.

I, therefore, concur in the decision to reverse the judgment in favor of Poirier and to remand this case for a new trial. Regarding the part of the majority opinion that declares the statute of frauds inapplicable, I respectfully dissent because I believe that is an issue for the trier of fact to decide.