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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000745-MR

DANNY RAINS — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 05-CI-00801

MICHAEL PATRICK, CITY OF WILLIAMSBURG, KENTUCKY, BY AND THROUGH ITS MAYOR, RODDY HARRISON, AND ITS CITY COUNCIL MEMBERS, BEING RICHARD FOLEY, PAUL ESTES, LAUREL WEST, CHET RILEY, JOE EARLY, AND DONNIE WITT, ALL IN THEIR OFFICIAL CAPACITY — APPELLEES

OPINION & ORDER
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; NICKELL, JUDGE; GRAVES,[1] SENIOR JUDGE.

NICKELL, JUDGE: Danny Rains (Rains) appeals three rulings of the Whitley Circuit Court dismissing a complaint for fraud against Michael Patrick (Patrick)[2] and a breach of contract claim against the City of Williamsburg (City) and overruling a motion to alter, amend or vacate[3] the order dismissing the complaint *in toto*. We affirm.

FACTS

In 2001, the City began acquiring easements for installation of a sanitary sewer line. Any landowner donating an easement received one free sewer hook-up. No one received free sewer service since monthly sewage fees were being used to retire the bond debt. The property of four landowners who chose not to donate an easement was acquired through condemnation with each landowner receiving about $4,000.00. Thirty-eight easements were executed for the project.

Rains and his partners, Ted and Barbara Bargo (the Bargos),[4] were asked to donate an easement, which they ultimately executed on October 11, 2001. This appeal focuses generally on the negotiations that produced the easement

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[2] Patrick was the Whitley County Judge/Executive when he introduced Williamsburg City Attorney Frank Atkins (Atkins) to Rains in 2001 to discuss the City's need for a sewer easement. Patrick left elected office on December 31, 2005, and the following week began employment with the Kentucky Transportation Cabinet.

[3] Kentucky Rules of Civil Procedure (CR) 59.01.

[4] The Bargos are not a party to this lawsuit.

signed by Williamsburg Mayor William Nighbert (Nighbert)[5] on behalf of the City, Rains, and the Bargos, and in particular on the consideration agreed upon by the parties.

Rains and the Bargos developed a list of items they wanted in return for giving the easement. When Atkins failed to secure an agreement, either he or Nighbert asked Patrick to introduce a City representative to Rains. Patrick knew the Rains family, thought he might be able to help, and agreed to introduce Atkins to Rains.

On an unspecified date, Patrick and Atkins met with Rains. Atkins did not recall what was discussed. Rains said he asked for a ditch to be cleaned, a road barricade to be moved, a free sewer hook-up and free sewer service in return for donating an easement. Patrick recalled Rains asking that the ditch be cleaned and the barricade be repositioned, both of which he approved as County Judge/Executive. The only other item he recalled Rains requesting was a free sewer hook-up. If Rains requested free sewer service, Patrick said he did not construe it as such. Both Rains and Patrick agreed that Patrick said he would have to ask Nighbert whether the City would give Rains a free sewer hook-up. According to Rains, he thought Patrick was also asking Nighbert about free sewer service since for him that was the linchpin of the consideration for the easement.

In describing what happened next, Rains stated:

[5] Nighbert left elected office in 2002 to become Secretary of the Kentucky Transportation Cabinet. Nighbert was never deposed. Rains listed him as a trial witness, but the case was dismissed before Nighbert testified.

> A few days later [Patrick] came and tole (sic) me it was a go but they couldn't put the free service on paper because everybody else would want it too but as long as I didn't say anything the Mayor would take care of it. I said that would work for me. A few days later the road crew came out and cleaned the ditch. Truman Prewitt came out and ran sixty (60) feet of line and hooked it into the sewer and since Truman Prewitt worked for the City water I was sure the Mayor gave his okay. So I had free service for about three (3) years until they cut it off.

Rains testified via deposition that his home was hooked to the sewer line as soon as the line was completed.[6] Then, in June 2005, he received a letter from the City water department saying he was illegally connected to the sewer system and should immediately apply for service and pay the $500.00 tap-on fee. Atkins confirmed the tap-on fee was to be waived because Rains had donated an easement to the City. However, Rains never applied for sewer service. Rains estimated the City cemented the sewer line to his home and terminated service about a week after he received the letter advising him he was illegally connected to the system.[7]

In contrast, Patrick says the only item he discussed with Nighbert on behalf of Rains was a free sewer hook-up, which Nighbert approved but said would not be reflected in the written easement. After learning that Rains was upset about his sewer service being terminated, Patrick asked Nighbert whether he remembered "talking about giving free service and he said no he did not." Patrick

[6] The record does not reveal when the sewer line was installed nor when Rains began receiving sewer service. To use the sewer line, he installed two pumps, a septic tank and two hundred feet of sewer line at a cost of $2,834.00 according to a plumber's bill dated August 2003.

[7] The City terminated sewer service between June 1, 2005, and November 14, 2005.

denied talking to Rains as an agent of the City. He also denied any conduct that would have made him liable to Rains for a claim of fraud.

For its part, the City admitted giving Rains a free sewer hook-up but denied giving him free sewer service. The City maintained that Rains tapped into the system without its knowledge and then refused to apply for sewer service when a smoke test revealed the illegal connection. As a result, the City cemented the sewer line and terminated service to Rains's residence.

Andrew Meadors (Meadors) with the Cumberland Valley Area Development District was the only other government official to discuss the easement with Rains. After meeting with Rains in September 2001, Meadors summarized their conversation in a letter dated October 11, 2001, the same day the easement was executed. The letter identified six items[8] demanded by Rains in return for donating the sewer easement. It mentioned waiving the sewer tap-on fee but said nothing about the City providing Rains free sewer service. In addition to reciting Rains's demands for the easement, Meadors's letter directed Rains to advise the City when he tapped on to the sewer line.

[8] The six items summarized in Meadors's letter were:

> 1. Relocate the access point to the sewer lateral at your business (Watts Creek Bingo), 2. Waive sewer tap fee, 3. Access to the new force sewer main via a tap ("T") designed and installed as part of the City's sewer project for future access by you. (I assume the actual point of the "T" would be determined by you working with the City's engineers and staff), 4. Request that the County Road Department clean-out the ditch line on Watts Creek Road in front of your property, 5. Request the County Judge/Executive, with Fiscal Court approval, consider moving the closed point on the Watts Creek Road to a certain point north of the existing closure, and 6. Provide a water tap at the car lot of 25W.

Without knowing the precise terms of the City's agreement with Rains, Atkins drafted the easement signed by Rains, the Bargos, and Nighbert on October 11, 2001. Atkins said it was the City's intention to give one free sewer hook-up to each landowner donating an easement. The free sewer hook-up was mentioned in some, but not all, of the easements. The easement for the Rains/Bargo property stated only that it was given "for and in consideration of $1.00 and other good and valuable consideration."

On November 14, 2005, Rains filed suit against Patrick for fraud and against the City for breach of contract.[9] The complaint alleged "Patrick negotiated free sewer service and free hook up" for Rains in return for a sewer easement that Rains signed to his detriment as a result of Patrick's false representations. The complaint further alleged the City breached its oral agreement with Rains by providing free sewer service for three years before denying the existence of any such agreement and terminating service. Rains argued that if Patrick was an agent of the City, the City breached its agreement; alternatively, if Patrick was not an agent of the City, Patrick fraudulently induced Rains to sign the easement and Patrick was personally liable to him for more than $4,000.00. Rains sought

[9] From the style of the complaint, Rains sued Nighbert and the six city council members in their official capacity. The style of the case lists Patrick as a defendant but does not state whether he is being sued in his official capacity as Whitley County Judge/Executive, solely as an individual, or both. As a result, Patrick argued he was sued only in his official capacity based on the caption in the complaint and the pleadings. At trial, Rains maintained he had sued Patrick only as an individual. When a public official is sued only as a private person, the better practice is to specify in the style of the case the capacity in which the defendant is being sued. *See generally, McCollum v. Garrett,* 880 S.W.2d 530, 532 (Ky. 1994). This is especially true when there are multiple defendants and they are being sued in different or multiple capacities.

compensatory and punitive damages from Patrick; compensatory damages from the City; either specific enforcement of the oral agreement for free sewer service, or an injunction requiring removal of the sewer line from his property; and a jury trial. Atkins filed a joint answer on behalf of all the defendants asking that the complaint be dismissed because it failed to state a claim upon which relief could be granted; it did not satisfy CR 9.02 because it did not describe the fraud charge against Patrick with particularity; and all the defendants were immune from suit.

Patrick and the City were ultimately represented by separate counsel but advanced many of the same arguments. Both the City and Patrick moved to amend their answers to argue that Rains's claims were barred by the statute of frauds, which requires agreements that cannot be performed within one year and contracts for the sale of real estate to be in writing. KRS 371.010 (6) and (7). The written easement said nothing about free sewer service, and Rains had no other writing on which to rely.

Both defendants moved for summary judgment. The City claimed it did not know that Rains believed he had been given free sewer service as part of the consideration for the easement. As proof, the City argued: Rains admitted he had never discussed the easement or free sewer service with Nighbert or any council member; Meadors denied discussing free sewer service with Rains when confirming the consideration to be given for the easement; Rains did not ask for free sewer service at the signing of the easement; Nighbert and the council members were protected by official immunity because they were sued only in their

official capacity and none of them negotiated the easement; and finally, the City was immune from liability because there was no allegation of bad faith or negligence. The City asked that any claims against it, its mayor, or its council members be dismissed with prejudice. Patrick included two additional arguments in his motion. He maintained that all of Rains's prior discussions with City representatives merged into the written easement and that Rains did not plead fraud or prove the elements of fraud clearly and convincingly.

Rains responded to the summary judgment motions by saying Patrick never denied promising free sewer service, only that he could not remember denying service; and, since the City provided him free sewer service for three years, its partial performance took the oral agreement for free service outside the statute of frauds. In a supplemental response, Rains argued the merger doctrine applied only to prior defects in title and construction.

After ordering the amended answers to be filed, the trial court overruled the summary judgment motions, and the case was called for a jury trial on February 15, 2007. The morning the trial began, Patrick renewed his motion to dismiss/motion for summary judgment. After hearing arguments at the bench, the court dismissed the fraud charge saying Patrick had no authority to make an agreement on behalf of the City; the easement was ultimately signed by the City, not by Patrick; and Patrick had no personal liability for the easement since all he did, as a private citizen, was bring Rains and Atkins together to negotiate a deal.

Rains did not object to the dismissal of Patrick; he asked only that Patrick remain available as a witness, which he did.

A jury was seated and sworn. After hearing opening statements and testimony from Atkins, Meadors and Patrick, the trial court excused the jury and asked the parties whether there was any writing showing that Rains had been promised free sewer service. Counsel for Rains responded, "No," and admitted that the only writing was the signed easement, which said nothing about free sewer service. When the court repeated the same question a few minutes later, counsel for Rains again stated, "[t]here is no writing pursuant to the testimony that we've had." Following a brief discussion of the statute of frauds, the court sustained the City's motion to dismiss the remaining breach of contract claim. Thereafter, Rains asked the court to note his objection; the court said he would put his reasons for dismissing the complaint into writing, and the jury was discharged.

On February 16, 2007, Rains moved the court to reconsider both its pre-trial dismissal of Patrick and its dismissal of the complaint against the City during Rains's case-in-chief. Rains again argued that the statute of frauds did not bar enforcement of the alleged oral agreement because he fully performed his part of the contract and the City had partially performed its part of the agreement for three years before ending sewer service. Rains also argued that Patrick's testimony alone was sufficient to submit the case to the jury and that a written promise of free sewer service was unnecessary because KRS 371.030 allows actual consideration for a deed to be proved by parol evidence. While acknowledging that government

officials enjoy immunity, Rains argued that such protection did not extend to making contracts. KRS 65.2003. Rains urged the court to order specific performance because there was no adequate remedy at law or, alternatively, to rescind the easement. On February 23, 2007, Rains supplemented his motion to reconsider with his own affidavit claiming that he and the Bargos had fully executed the easement; Patrick said he was acting on behalf of the City; Rains and the Bargos agreed to sign the easement only upon satisfaction of their four demands, which included both a free sewer hook-up and free sewer service; and Patrick never said that the City had rejected their demands.

On February 27, 2007, the court entered a written order dismissing the case. It said both Patrick and the City had filed pre-trial motions seeking dismissal of the lawsuit under the statute of frauds. In particular, the court stated, "Michael Patrick was not an agent for the City of Williamsburg and did not make an agreement for the City of Williamsburg." The court dismissed the case pursuant to KRS 371.010(6) and (7) because there was no written evidence that the City agreed to give Rains free lifetime sewer service, and such an agreement, if made, could not be performed within one year. Since the only writing offered by Rains, the deed for the sewer line easement, said nothing about the easement being given in return for free lifetime sewer service, the trial court found that enforcement of the alleged oral agreement was barred by the statute of frauds.

Both defendants responded to the motion to reconsider. Patrick argued that Rains had neither challenged the court's conclusions nor alleged clear

error; Rains had an adequate legal remedy since he could be paid the value of his land plus the value of the sewer easement; and finally, because municipal governments speak through their formal records, the parties were restricted to the terms recited in the executed easement.

Rains then moved the trial court to alter, amend or vacate its trial order for the same reasons stated in his prior motion to reconsider. In response, the City argued that the civil rules do not provide for the filing of a motion to reconsider; the motion to alter, amend or vacate was not filed in time to be heard on the court's March 5, 2007, docket;[10] KRS 382.135[11] requires the actual consideration for a real estate transfer to be included in the deed; and in light of the trial testimony, Rains could not clearly and convincingly prove that free lifetime sewer service was part of the consideration for the easement. A few days later, the City filed an amended response arguing that Rains lost the right to file suit when he transferred his interest in the property to the Bargos.[12]

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[10] On March 6, 2007, Rains filed a second motion to alter, amend or vacate and noticed it to be heard on March 30, 2007. This motion repeated much of the one filed the previous day, but also took issue with the findings of fact made by the trial court. For the first time, Rains argued that the trial judge should have recused himself from the case because he found that Patrick acted in his official capacity as County Judge/Executive and that the judge's son is the Whitley County Attorney.

[11] KRS 382.135(2) excepts "[d]eeds which only convey utility easements" from the filing requirement that full consideration for an easement be recited in the deed.

[12] Recorded deeds filed in the court record establish that Rains and the Bargos initially acquired the subject property from Henderson and Ruth Rains on February 23, 2000, with each party receiving a one-half undivided interest. The sewer easement was executed by Rains, the Bargos and Nighbert on October 11, 2001. On June 24, 2003, Rains conveyed his entire interest in the parcel to the Bargos. On September 1, 2005, the Bargos transferred the property back to Rains. On March 24, 2006, Rains transferred the property to his son, Eric Rains, with a warranty deed being recorded on April 5, 2006. In another warranty deed, also dated March 24, 2006, but not recorded until one week before trial commenced, Eric Rains transferred the same parcel back to

In response to the motion to alter, amend or vacate, Patrick argued that Rains did not specify the capacity in which he was suing Patrick; Patrick was protected by absolute immunity because the court ruled that he had acted in his official capacity as County Judge/Executive and Rains did not contest that ruling; and finally, Patrick, now a state employee, could neither rescind the easement executed by the City nor force the City water department to provide free sewer service to Rains. Ultimately, an order was entered overruling the motion to alter, amend or vacate. This appeal followed, and we now affirm.

ANALYSIS

his father. The Bargos owned the land at the time the City terminated sewer service in 2005, but it had been transferred back to Rains at the time he filed suit in November 2005. We are not told the reason for these transfers, but they served as the basis for the City to argue champerty and lack of standing.

This appeal presents two questions.[13] First, was Rains promised free sewer service by the City in exchange for an easement. Second, did Rains's lack of written proof of the City's promise of free lifetime sewer service make the alleged oral agreement unenforceable since the statute of frauds requires agreements for the sale of real estate and those that cannot be completed within one year to be in writing. We ponder these questions with full knowledge that Rains did not have to donate a sewer easement to the City as he twice refused to do. Further, we note problems inherent in such an alleged promise that the City

[13] Because Rains's appellate briefs do not state with specificity how and where in the record the alleged errors were preserved, they do not conform to CR 76.12(c)(v). Beginning an argument with, "[t]his issue has been preserved for appellate review by virtue of all of the motions and arguments made before the Trial Court[,]" as Rains has done, satisfies neither the letter nor the purpose of the rule nor the case law interpreting it. *Elwell v. Stone,* 799 S.W.2d 46 (Ky. 1990). When a brief does not comport with the requirements of CR 76.12(c)(v), we are authorized to strike the brief entirely, as was legitimately requested by Patrick in both his brief and in a separate motion filed with this Court. Alternatively, we may review the allegations of error for manifest injustice rather than considering them on the merits. *Id.*; CR 61.02.

In this case, one of two appellees urged us to strike Rains's briefs. Even without a request, we may impose sanctions for non-compliance *sua sponte.* Non-compliance with the rule is not always fatal, and in this case we choose to follow the lead of *Baker v. Campbell County Board of Education,* 180 S.W.3d 479, 482 (Ky. App. 2005) and not impose a sanction for Rains's "technical violation" since our search of the relatively small record revealed the alleged errors were preserved for our review. Instead, we will use this opportunity to emphasize the importance of preserving error in the trial court as a requisite to arguing error on appeal to this Court.

Rains advances two arguments on appeal. As proof of preservation for each he cited to the complaint he filed in the trial court to initiate the litigation. He did not, as required by CR 76.12(c)(v), cite to the precise point in the record at which he apprised the trial court of its alleged error and gave it the opportunity to rule on the matter. Just as citing to a prehearing statement in *Baker v. Weinberg,* 266 S.W.3d 827, 835 (Ky. App. 2008), was inadequate to preserve an alleged error for our review, citing to a complaint is equally inadequate. The purpose in requiring the statement of preservation is to ensure the trial court was given the opportunity to rule on the issue before we can consider it on appeal. *Hines v. Carr,* 296 Ky. 78, 81, 176 S.W.2d 99, 100-101 (1943).

We underscore that CR 76.12(c)(v) requires counsel to state with specificity how and where in the record any alleged error was preserved. General references such as that made in Rains's appellate brief fall far short of the acceptable standard. We will not hesitate to impose authorized sanctions in the future where we deem them to be justified by the circumstances.

would have given Rains free sewer service: when no other landowner received such a benefit; when giving free sewer service would have jeopardized repayment of the publicly financed project; and when the City could have initiated condemnation proceedings against Rains as it had against four other landowners.

CR 12.02(f) allows a defendant to seek dismissal when a complaint fails "to state a claim upon which relief can be granted." Dismissal should not be granted "unless it appears the [plaintiff] would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari-Mutuel Clerks' Union of Kentucky v. Kentucky Jockey Club*, 551 S.W.2d 801, 802 (Ky. 1977). *See also James v. Wilson*, 95 S.W.3d 875, 883-4 (Ky. App. 2002). Because the dismissal was a matter of law, our review is *de novo*. *Revenue Cabinet v. Hubbard*, 37 S.W.3d 717, 719 (Ky. 2000). Upon completing our *de novo* review, we hold that Rains's arguments fail on the merits, and we now affirm.

I. BREACH OF CONTRACT CLAIM AGAINST CITY

Rains's first complaint is that the trial court erred in dismissing his breach of contract claim against the City based on the statute of frauds. He contends that the alleged promise of free sewer service did not have to be written because he completed his part of the agreement and the City partially performed its part of the deal. He also argues that parol evidence can be used to prove the actual consideration for a utility easement. For the reasons that follow, we affirm the trial court's dismissal[14] of the breach of contract claim against the City.

[14] Although unspecified in the court's orders, we construe dismissal of the breach of contract claim to have been pursuant to CR 12.02(f), failure to state a claim upon which relief may be

A. Contracts for Sale of Real Estate

A sewer easement is a contract for the sale of real estate. *Jennett v. Sherrill,* 205 Ky. 307, 265 S.W. 781 (Ky. 1924). The statute of frauds requires contracts for the sale of real estate to be in writing. KRS 371.010(6). Ordinarily, the actual consideration for a transfer of real estate must be stated within the deed, KRS 382.135(1)(b), but "[d]eeds which only convey utility easements" are exempt from this filing requirement. KRS 392.135(2)(a). While KRS 371.030 allows "[t]he consideration of any writing, with or without seal, [to be] impeached or denied by pleading," this provision cannot "be used to nullify the elementary law that a public or municipal corporation, [such as the City], can speak only through its formal records and that such constitute the only legal evidence of all that was done and that nothing was done." *Louisville & Jefferson County Metropolitan Sewer Dist. v. General Distillers Corp. of Kentucky,* 257 S.W.2d 543, 547 (Ky. 1953) (citations omitted). Under the merger doctrine, "all prior statements and agreements, both written and oral, not specifically incorporated into a deed or other instrument, are a nullity, and may not be relied upon by any party." *Borden v. Litchford,* 619 S.W.2d 715, 717 (Ky. App. 1981). If the merger doctrine applies, as we believe it must, Rains cannot prevail on the breach of contract claim. *Yeager v. McLellan,* 177 S.W.3d 807, 809 (Ky. 2005).

The only writing offered as proof of the agreement was the sewer easement itself, and it said nothing about free sewer service. Rains's own words

granted, since the court did not say it was granting summary judgment under CR 56.03.

established he never claimed or offered proof that anyone agreed to provide him free sewer service in exchange for the easement. He himself made an admission fatal to his breach of contract claim when he admitted in his 2006 deposition, "I can't actually remember if somebody said that I would get free sewer other than I had asked for free sewer." Merely asking for free sewer service does not mean the City agreed to provide it.[15]

Later in his deposition Rains stated, "I assumed I got my free sewer service like I was told I was going to get[,]" but he never offered any proof the promise of free sewer service was ever made. When asked in an interrogatory to describe any written agreement giving him "the right to use the sewer service at issue free of any costs, and identify the person or persons who executed that agreement of (sic) behalf of the City of Williamsburg," Rains responded, "None." When asked whether he received "formal written approval from the City of Williamsburg stating that you were entitled to a sewer hookup and service free of all costs," he answered, "No, only the word of Mike Patrick." When asked why he thought he did not receive a bill for sewer service for three years, he stated, "Because as long as Neighbert (sic) and Patrick was Mayor the city knew what the deal was." Finally, at trial, the court specifically asked Rains, twice, whether there was any writing documenting the promise of free sewer service. Both times counsel for Rains responded, "No."

[15] Although not argued by the City, we question whether Rains and the City reached a meeting of the minds for their agreement as required by *Conseco Finance Servicing Corp. v. Wilder*, 47 S.W.3d 335 (Ky. App. 2001) (citing *Forsythe v. BancBoston Mortgage Corp*., 135 F.3d 1069 (6th Cir. 1997)).

Thus, Rains did not have proof, written or oral, to establish the City had promised him free sewer service in return for the easement. We hold, as a matter of law, that Rains could not prevail on the breach of contract claim under any circumstances because he had no writing showing that the City ever promised him free lifetime sewer service in return for donating an easement, and such a writing was necessary to satisfy the statute of frauds. Therefore, the trial court committed no error by dismissing the claim.

B. Contracts Not to be Performed Within One Year

Just as only written agreements for the transfer of real estate are enforceable, "any agreement that is not to be performed within one year from the making thereof" must also be written to satisfy the statute of frauds. KRS 371.010(7). Generally, "if a contract may be performed within a year from the making of it, the inhibition of the Statute does not apply, although its performance may have extended over a greater period of time." *Williamson v. Stafford,* 301 Ky. 59, 62, 190 S.W.2d 859, 860 (1945) (citations omitted). However, "there is a well-recognized exception to the rule above recited, and that is that when it was contemplated by the parties that the contract would not, and could not, be performed within the year, even though it was possible of performance within that time, it comes within the inhibition of the Statute." *Id. See also,* Restatement (Second) of Contracts Sect. 130 (1981) ("Contracts of uncertain duration are simply excluded; the provision covers only those contracts whose performance cannot possibly be completed within a year").

Rains argues that the City's alleged oral agreement for free sewer service, made on its behalf by Patrick, was not prohibited by the statute of frauds because Rains fully performed his end of the bargain by signing the easement and the City partially performed its end of the bargain by giving him sewer service for three years without sending him a bill. In support of his argument, Rains cites *United Parcel Service Co. v. Rickert*, 996 S.W.2d 464, 471 (Ky. 1999) (oral employment contract that could have been performed within one year was not barred by statute of frauds); *Buttorff v. United Electronic Laboratories, Inc.,* 459 S.W.2d 581 (Ky. 1970) (oral agreement to market surveillance cameras not barred by statute of frauds where marketer had fully performed agreement); *Ma-Beha Co. v. Acme Realty Co.,* 286 Ky. 382, 150 S.W.2d 1 (1941) (oral five-year lease agreement was unenforceable under statute of frauds where it was fully executed and had expired); and, *Smith v. Cloyd,* 260 Ky. 393 85, S.W.2d 873 (1935) (oral supplemental agreement requiring leasor to maintain rental property in good repair for five years was not barred by statute of frauds where leasor had partially performed agreement).

Since none of the cases cited by Rains deals with the sale of real estate their application is limited because we have already established that those contracts must be written. KRS 371.010(6). Furthermore, under Kentucky law, partial performance of a contract for the sale of land does not take it outside the statute of frauds. *Bennett v. Horton,* 592 S.W.2d 460, 463 (Ky. 1979); *Head v. Schwartz' Ex'r,* 304 Ky. 798, 800, 202 S.W.2d 623, 625 (1947). Finally, there is the nagging

fact that Rains availed himself of free sewer service by tapping onto the system without notifying the City despite its request that he do so if and when he tapped onto its system. Under the facts presented, it is difficult to conclude the City was actively performing its part of the bargain when it was unaware Rains was even using its sewer system. As proof of the City's lack of knowledge, it is particularly telling that the City terminated service to Rains's home upon learning of his usage and refusal to apply for service as the City had requested.

Rains cites *Caudill v. Trimble's Adm'r,* 273 Ky. 793, 117 S.W.2d 993, 995 (1938), for the proposition that full performance by one party and acceptance of that performance by another party removes a verbal agreement for transfer of realty from the statute of frauds. We distinguish *Caudill* because there was substantial evidence in that case upon which the court found that an agreement existed. That is not the scenario presented to us in the case *sub judice* as there is no proof, written or otherwise, that the City ever agreed to obligate itself to give Rains free sewer service for life in exchange for a sewer line easement.

Rains argues that *General Distillers, supra,* is directly on point and requires reversal. We disagree. In *General Distillers*, Louisville's sewer system was being upgraded in 1935. Property owners would be allowed to connect to the improved system at their own expense, but a letter from the project's chief engineer said nothing about users receiving free sewer service. Until 1946, landowners within Louisville's city limits used the city's sewer system without charge. Then, a fee for using the sewer system was imposed as a result of action

taken by the Kentucky General Assembly. General Distillers filed suit seeking a declaration of rights to continue using the sewer system without charge. The sewer district counterclaimed for past due sewer charges. At trial, the president of General Distillers testified that he had negotiated an oral agreement with the Sewerage Commission allowing General Distillers free use of the local sewer system as consideration for granting an easement. The appellate court discounted the president's testimony since he had a pecuniary interest and concluded that free sewer service was not part of the consideration for the easements because in 1935 no one envisioned imposition of a future sewer usage fee.

We do not read *General Distillers* as requiring reversal in the present case. Here, Atkins that testified each landowner donating an easement was to receive one free sewer tap-on, but no landowner was to receive free sewer service because usage fees were being used to retire the bond debt. Thus, the City would not have offered Rains free sewer service to induce him to donate a sewer easement.

Our review of the law reveals no scenario under which Rains could have prevailed on the breach of contract claim without a writing showing that he was promised free lifetime sewer service as part of the consideration for the easement. A writing was required both because the easement was a contract for the sale of land and because the alleged grant of free lifetime sewer service could not be performed within one year. Thus, the trial court's order of dismissal was

correct under the standard of review discussed in *Pari-Mutuel Clerks' Union, supra.*

II. FRAUD CLAIM AGAINST PATRICK

Rains's second and final contention is that the trial court clearly erred in dismissing Patrick from the suit before trial began. Patrick was dismissed on the morning of trial when he renewed his motion to dismiss/motion for summary judgment on grounds of immunity. Based on the caption on the complaint and the pleadings, Patrick believed that he was being sued only in his official capacity. However, counsel for Rains clarified that Patrick was not being sued in his official capacity at all; he was being sued only as an individual. Rains argued that Patrick was culpable for fraudulent misrepresentations (allegedly assuring him Nighbert had said he would receive free sewer service) because he supposedly was the City's agent. Patrick contends that he was not the City's agent and that all he did was introduce Atkins to Rains and ask Nighbert whether Rains could have a free sewer hook-up in return for an easement. Rains opposed Patrick's renewed motion to dismiss/motion for summary judgment but did not object when the trial court dismissed Patrick from the suit; Rains asked only that Patrick remain available to testify as a witness, which he did. While Rains now argues that the trial court's reason for dismissing Patrick was unclear, he sought neither a specific finding nor a clarification of the court's decision.

Rains addressed this issue in the context of immunity. However, the trial court specifically stated that it did not find Patrick was immune and further

stated, "Michael Patrick was not an agent for the City of Williamsburg and did not make an agreement for the City of Williamsburg." The evidence before us is that Patrick was asked by Nighbert or Atkins to introduce a representative of the City to Rains, Patrick agreed to make an introduction, and he introduced Atkins to Rains. Since there is no evidence that Patrick agreed to negotiate an easement, and Patrick stated in his deposition that he did not make the introduction in response to an official request from the City, it appears that Patrick's involvement, as concluded by the trial court, was limited to introducing Atkins to Rains so that Atkins and Rains could negotiate a deal.

Because the easement was ultimately executed by Rains, the Bargos, and Nighbert on behalf of the City, we ascribe no individual liability to Patrick. If Nighbert approved free sewer service, in addition to the free sewer hook-up that all agree was part of the "other good and valuable consideration" for the easement, then Rains's complaint about the termination is more properly against Nighbert since Patrick was merely a conduit for passing information between Rains and the City. However, as previously established, without a writing, the alleged oral agreement was unenforceable under the statute of frauds.

Moreover, the six elements that one must prove to prevail on a claim of fraud are: "a) material representation, b) which is false, c) known to be false or recklessly made, d) made with inducement to be acted upon, e) acted in reliance thereon, and f) causing injury." *Rickert, supra,* 996 S.W.2d at 468. Since all six elements must be proved, the failure of any one of them is fatal. Rains did not

prove item e), reliance upon information received from Patrick. Reliance on an alleged misrepresentation had to be reasonable in light of Rains's knowledge and experience. *Bassett v. National Collegiate Athletic Ass'n,* 428 F.Supp.2d 675, 682 (E.D.Ky. 2006) (citing *Moore, Owen Thomas & Co. v. Coffey,* 992 F.2d 1439, 1447 (6th Cir. 1993) and *Vest v. Goode,* 307 Ky. 52, 209 S.W.2d 833, 836 (1948)). Rains was not unsophisticated; he was a businessman who readily transferred property. He also clearly knew he could barter with the City since he created a list of demands and declined its requests since he and the Bargos refused at least two inquiries from the City before Patrick entered the picture.

When asked why he believed that Patrick was authorized to negotiate an agreement for the City, Rains answered, "Patrick said he would talk to Mayor Neighbert (sic) and see if he could get the job done, he was the County Judge Executive and Neighbert (sic) the Mayor. . . ." Based on this statement, Rains knew that Patrick, as Judge Executive for the County, had no authority to bind the City regarding any request for free sewer service. Therefore, he cannot reasonably assert under any circumstances that he relied to his detriment on any misrepresentations Patrick allegedly made on behalf of the City. At the very least, Rains should have questioned Patrick's role and authority and confirmed that while the promise of free sewer service was not documented in writing, it was indeed part of the deal. In light of Rains's expertise, it was unreasonable for him to believe that Patrick, the Whitley County Judge/Executive, was authorized to strike

a bargain on behalf of the City on a project for which Whitley County had no responsibility.

Based on the above, we hold that Rains's claims were barred by the statute of frauds due to the lack of a writing showing that the City promised him free sewer service for life. As a result, there was no scenario under which Rains could have prevailed on a claim of fraud. *Pari-Mutuel Clerks' Union, supra.* Therefore, we AFFIRM the decision of the Whitley Circuit Court and DENY the motion filed by Patrick to strike appellant's briefs and summarily affirm.

ALL CONCUR.

ENTERED: April 10, 2009

JUDGE, COURT OF APPEALS

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