

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2013-CA-001194-MR

SHANDA M. FORISH

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE SUSAN SCHULTZ GIBSON, JUDGE  
ACTION NO. 12-CI-004416

CHARLES R. "RUSTY" HOCKER, II

APPELLEE

OPINION  
AFFIRMING

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BEFORE: MAZE, MOORE, AND VANMETER, JUDGES.

VANMETER, JUDGE: Shanda Forish appeals from the Jefferson Circuit Court's orders granting Charles Hocker, II's motion to dismiss pursuant to CR<sup>1</sup> 12.02(f) and denying her motion to vacate the dismissal pursuant to CR 59.05. For the following reasons, we affirm.

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<sup>1</sup> Kentucky Rules of Civil Procedure.

On February 8, 2010, Forish and her associate, who is not a party to this action, entered into a Stock Purchase Agreement with Hocker for the sale of each of their 50 shares of stock in The Wireless Connection, LLC (“Wireless Connection”). Per the terms of the written Agreement, Hocker paid each of them \$500 for 50 shares and assumed all operations of the business. Forish claims that in addition to the written Agreement, Hocker orally agreed to employ her for three years at a salary of \$40,000 for the second and third years, and to personally assume and pay off the financial debt of Wireless Connection within three years.

On January 31, 2011, Hocker terminated Forish’s employment and later that year Hocker allegedly stopped making payments on debt owed by Wireless Connection. Forish then filed a complaint for breach of contract seeking \$80,000 as compensation for the two years of employment allegedly owed to her and \$70,000 for the remaining debt of Wireless Connection for which she asserts Hocker agreed to pay. Hocker moved to dismiss the complaint pursuant to CR 12.02(f) based on the Statute of Frauds, KRS<sup>2</sup> 371.010(7), arguing Forish failed to affirmatively provide the court with any basis upon which relief could be granted. Forish’s response to Hocker’s motion to dismiss contained an affidavit by Forish, which the trial court declined to consider. Following oral argument, the trial court granted Hocker’s motion to dismiss, concluding that the Statute of Frauds barred both alleged oral agreements as a matter of law and that no exceptions applied to require their enforcement.

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<sup>2</sup> Kentucky Revised Statutes.

Forish then filed a CR 15.02 motion to amend the pleadings to allege promissory estoppel, which she maintained had been tried by implied consent of the parties. She also filed a CR 59.05 motion to vacate the court's order of dismissal. In reviewing the motions, the trial court did not find promissory estoppel had been tried by implied consent of the parties, and even if it had, the pleadings did not reflect that Hocker made a promise to Forish with the intent to induce an action or forbearance on her part. The court denied Forish's motion to vacate and refused to consider Forish's affidavit. Forish now appeals.

Forish first asserts that the trial court abused its discretion by not considering her affidavit. CR 12.02 provides if "matters outside the pleading" such as affidavits are presented to and not excluded by the court, then the motion to dismiss will be treated as one for summary judgment. *Spillman v. Beauchamp*, 362 S.W.2d 33, 34 (Ky. 1962). The trial court has discretion to decide whether to consider an affidavit. *Vigue v. Underwood*, 139 S.W.3d 168, 170 (Ky. App. 2004). Here, the trial court stated in its order denying Forish's motion to vacate that it had elected not to consider the affidavit at any point, and had treated Hocker's motion as a motion to dismiss, rather than a motion for summary judgment. Forish has failed to demonstrate how this decision was an abuse of the trial court's discretion.

Next, Forish contends that the trial court erred by granting Hocker's motion to dismiss and abused its discretion by denying her motion to vacate. The appellate standard for reviewing a trial court's dismissal of a complaint is as follows:

A motion to dismiss for failure to state a claim upon which relief may be granted “admits as true the material facts of the complaint.” So a court should not grant such a motion “unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved....” Accordingly, “the pleadings should be liberally construed in the light most favorable to the plaintiff, all allegations being taken as true.” This exacting standard of review eliminates any need by the trial court to make findings of fact; “rather, the question is purely a matter of law. Stated another way, the court must ask if the facts alleged in the complaint can be proved, would the plaintiff be entitled to relief?” Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court’s determination; instead, an appellate court reviews the issue de novo.

*Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (internal citations omitted).

Additionally, a trial court’s ruling on a motion to alter or amend judgment or to vacate judgment and enter a new one is reviewed by an appellate court under the abuse of discretion standard. *Bowling v. Kentucky Dep’t of Corr.*, 301 S.W.3d 478, 483 (Ky. 2009). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles.” *Woodard v. Commonwealth*, 147 S.W.3d 63, 67 (Ky. 2004) (citation omitted).

The Stock Purchase Agreement at issue contains no provision concerning Forish’s alleged three-year employment contract or Hocker’s alleged promise to personally pay off Wireless Connection’s debt. The Statute of Frauds provides, in pertinent part:

No action shall be brought to charge any person: . . .  
[u]pon any agreement that is not to be performed within  
one year from the making thereof . . . unless the promise,  
contract, agreement, representation, assurance, or  
ratification, or some memorandum or note thereof, be in  
writing and signed by the party to be charged therewith,  
or by his authorized agent. . . .

KRS 371.010(7).

In granting Hocker's motion to dismiss the trial court found:

The record is devoid of a Promissory Note executed by [Hocker], guaranteeing the corporate debts of The Wireless Connection, LLC. Review of the Stock Purchase Agreement reveals no express provisions which transfer liability of the corporate debts of The Wireless Connection, LLC, upon [Hocker]. There are no ambiguous terms in the Stock Purchase Agreement, such that parol[] evidence can be utilized. Likewise, there are no allegations of mistake of fact which would permit the utilization of parol[] evidence. As such, it does not appear that [Hocker's] alleged oral agreement to assume liabilities of The Wireless Connection, LLC, is enforceable under the Statute of Frauds as a matter of law.

We believe the trial court correctly held as a matter of law that the alleged oral three-year employment contract could not be completed within one year and therefore was unenforceable since not in writing. KRS 371.010(7). *See also Sawyer v. Mills*, 295 S.W.3d 79, 84 (Ky. 2009) (“where it is obvious from all surrounding facts and circumstances that it was not within the contemplation of the parties or within reason that [the contract] would be performed within a year the statute [of frauds] applies[.]”) (internal quotations and citation omitted). Further, even assuming Hocker had orally agreed to pay off Wireless Connection's debt,

and could have done so within one year (so as to remove the Agreement from KRS 371.010(7)'s writing requirement), Forish has admitted that the parties contemplated Hocker would satisfy the debt within three years. As a result, the Statute of Frauds bars this claim as well since the agreement was not in writing.

Forish next argues that the trial court should have admitted parol evidence to interpret the Agreement's terms.

Under the parol evidence rule, when parties reduce their agreement to a clear, unambiguous, and duly executed writing, all prior negotiations, understandings, and agreements merge into the instrument, and a contract as written cannot be modified or changed by prior parol evidence, except in certain circumstances such as fraud or mistake. *Childers and Venters, Inc. v. Sowards*, 460 S.W.2d 343, 345 (Ky. 1970). Only a mistake of fact will affect the enforceability of a contract, not a mistake of law. *Raisor v. Burkett*, 214 S.W.3d 895, 906 (Ky. App. 2006) (citations omitted). It is presumed that the written agreement is final and complete and that all prior negotiations between the parties have either been abandoned or incorporated into the final written instrument. *See Childers v. Lucas*, 301 Ky. 763, 192 S.W.2d 714 (1946). Kentucky courts have long recognized that oral agreements made prior to a written contract merge into the written contract. *Prudential Life Ins. Co. of America v. Bowling*, 237 Ky. 290, 35 S.W.2d 322, 323 (1931).

*New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 322 (Ky. App. 2009). If a written instrument is not ambiguous, the agreement will be strictly enforced according to its terms and "we are not permitted to create an ambiguity where none exists even if doing so would result in a more palatable outcome." *Id.* (citations omitted).

We agree with the trial court that the parties' written Agreement was not ambiguous and that no other writings describing the parties' alleged oral agreements exist. Forish makes no allegation of mistake of fact as to the written Agreement. The four corners of the Agreement do not address employment or assumption of debt; had these terms been vital to the parties' Agreement we believe they would have been reduced to writing. The Statute of Frauds was designed to provide finality to contracts and to prevent subsequent oral, unfounded claims such as these from altering a written agreement. As a result, the trial court correctly declined to admit parol evidence to interpret the Agreement.

Lastly, Forish maintains that her promissory estoppel claim should have been allowed to proceed. Assuming, *arguendo*, that the parties had impliedly consented to address this claim per CR 15.02, we do not believe that avenue of relief is viable in this circumstance. CR 15.02 provides, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

The doctrine of promissory estoppel states:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

*Sawyer*, 295 S.W.3d at 89 (citation omitted).

Forish has not provided any legal or factual basis in support of her promissory estoppel claim. Forish cites to *United Parcel Serv. Co. v. Rickert*, 996 S.W.2d 464, 471 (Ky. 1999), for the rule that “the statute of frauds is not a bar to a fraud or promissory estoppel claim based on an oral promise of indefinite employment,” yet this citation is unhelpful. Forish did not base her employment claim on an oral agreement of indefinite employment, as in *Rickert*; rather, she alleged an oral employment agreement of three years. Notably, the Kentucky Supreme Court has since characterized the aforesaid statement in *Rickert* as mere dicta and clarified that Kentucky law is unclear as to whether promissory estoppel can defeat the Statute of Frauds. *See Sawyer*, 295 S.W.3d at 90. Forish at best has alleged a reliance based on her own statements; nothing else in the record supports her assertion that she entered into the Stock Purchase Agreement only because Hocker agreed to employ her for three years and pay off the company’s debt.

Forish also cites to *Barnett v. Stewart Lumber Co.*, 547 S.W.2d 788 (Ky. App. 1977), yet that case is likewise unhelpful to her position. In *Barnett*, the court considered whether KRS 371.010(4) barred enforceability of a \$3,000 note that was not in writing and under which the purchaser of a sawmill allegedly agreed to assume the outstanding balance owed to the lumber company. *Id.* at 789. The *Barnett* court upheld the trial court’s enforcement of the oral agreement, finding “if one promises to pay the debt of another in order to further some purpose of his own, as to acquire a sawmill, such promise is not within [KRS 371.010(4)].” *Id.* at 790.



However, *Barnett* is factually and procedurally distinguishable from the present case. No written sales contract was made in *Barnett* and the case was tried before a jury. *Id.* at 789. At the close of the evidence, the trial court directed a verdict in favor of the lumber company and directed the purchaser of the sawmill to pay the debt owed to the lumber company, on grounds that the purchaser had orally agreed to assume the debt as part of the purchase of the sawmill. *Id.* On appellate review, the court affirmed, noting that final disposition of the \$3,000 note had been made. *Id.* at 790. While the court's opinion does not elaborate on the proof in the record supporting enforcement of the oral agreement, we assume ample proof existed, especially since the trial court's decision to direct a verdict in favor of the lumber company was affirmed.

By contrast, the parties in the present case executed a written purchase agreement under which no provision was made for assumption of debt or continued employment. Forish points to Hocker's answer in support of her claim that he agreed to assume the corporate debt, yet our review of Hocker's answer discloses no such admission. Other than simply citing *Barnett*, Forish has not elaborated on how this case supports her promissory estoppel claim. We do not believe the record substantiates her claim that she relied on Hocker's alleged oral agreement to employ her, or to personally pay off the debt of Wireless Connection, by way of forbearance or action.

We therefore hold that the trial court's decision to grant Hocker's motion to dismiss for failure to state a claim was correct as a matter of law, and the court did

not abuse its discretion by denying Forish's motion to vacate since its order dismissing was based on clearly reasoned and sound legal principles.

The orders of the Jefferson Circuit Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven D. Yater  
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BRIEF FOR APPELLEE:

Thomas H. Atkins  
Linda Y. Atkins  
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