[Cite as *ELM Invests., Inc. v. BP Exploration & Oil, Inc.*, 2012-Ohio-2950.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

ELM Investments, Inc. et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-1000
v.	:	(C.P.C. No. 10CVH-12-18955)
BP Exploration & Oil, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on June 28, 2012

Wolfe & Russ, LLC, and *Grant A. Wolfe*, for appellants.

Brouse McDowell, *Joseph T. Datillo*, and *Michael P. O'Donnell*, for appellee BP Exploration & Oil, Inc.

Roetzel & Andress LPA, *Jessica L. Davis*, and *Thomas A. Dillon*, for appellee Jones Lang LaSalle Americas, Inc.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶ 1} Plaintiffs-appellants, ELM Investments, Inc. ("ELM") and Eugene L. Matan ("Matan") (collectively, "appellants"), appeal the judgment of the Franklin County Court of Common Pleas, which dismissed appellants' complaint against defendants-appellees, BP Exploration & Oil Inc. ("BP") and Jones Lang LaSalle Americas, Inc. ("JLL") (collectively, "appellees"). For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On December 30, 2010, appellants filed a complaint against appellees for breach of contract and promissory estoppel and subsequently filed an amended complaint. In count one of the complaint, appellants alleged that BP owned certain property on Stelzer Road in Columbus, Ohio, and hired JLL to sell it. ELM informed JLL of its interest in bidding on the BP property during an online auction in November 2010. Appellants submitted several bids. The last one was for $80,000, plus a 5 percent buyer's premium. Another bidder submitted a winning bid for $82,500. Thereafter, Matan told JLL that he and/or ELM still wanted to purchase the property and would be interested in it if it came back on the market.

{¶ 3} About ten days later, JLL contacted Matan and informed him that the successful bidder had defaulted on the bid, and BP was putting the property on the market for a private sale. The complaint also alleged:

> JLL and/or BP requested whether or not Matan or ELM would be interested in paying $82,500 for the premises at 1690 Stelzer Rd., Columbus, OH 43219. Matan indicated in response that while neither he nor ELM would pay that price, he and/or ELM would pay $80,000, plus the 5% buyer's premium that they had previously bid during the internet auction. JLL agreed to call Matan back in response to Matan and/or ELM's offer to purchase the subject real property. JLL subsequently called Matan back and indicated that BP had accepted Matan and ELM's offer to purchase the subject real property for $80,000, plus the 5% buyer's premium. On the same day, JLL sent Matan an e-mail asking "what was the buying entity name that you would be purchasing the property under?" Matan replied to the email on November 30, 2010 indicating that the subject real property should be titled under the name of ELM Investments Inc. and that the purchase transaction would be a cash sale. Notwithstanding the parties' agreement for the purchase and sale of the subject real property, Matan was informed by JLL a few days later that BP would not close on the parties' contract and had decided to take the defaulted offer of $82,500, which it had previously abandoned.

{¶ 4} Appellants alleged that appellees' "breach of contract" caused them to incur compensatory damages in the amount of $170,000. They also sought punitive damages in the amount of $100,000, plus attorney fees.

{¶ 5} In count two, the complaint alleged that appellees had "unambiguously promised" appellants that they would sell the property to appellants for $80,000, plus the 5 percent buyer's premium. Appellants relied on this promise by (1) allowing appellees to keep the deposit from the internet auction as its deposit on the private sale, (2) liquidating portions of appellants' asset portfolio to raise cash for the purchase, and (3) incurring other expenses in connection with the sale. Appellants alleged that their detrimental reliance on appellees' promise caused them to incur damages in the amount of $170,000.

{¶ 6} BP and JLL filed separate answers to count two of appellants' complaint. BP and JLL also moved to dismiss count one of the complaint, contending that the complaint failed to allege or attach a written contract, in violation of the statute of frauds.

{¶ 7} In their memorandum contra, appellants contended that the statute of frauds applies only to agreements that cannot be performed within one year. In support, appellants attached the affidavit of Matan. Appellants also argued that, in any event, a writing did exist in the form of a series of emails. Appellants attached the emails and the deed for the property.

{¶ 8} On May 17, 2011, the trial court disregarded the evidence appellants had submitted and granted appellees' motions to dismiss appellants' claim for breach of contract. Appellants thereafter moved to amend their complaint to remove, and dismiss without prejudice, their claim for promissory estoppel and to enter final judgment. Over appellees' objection, the court granted appellants' motion.

II. ASSIGNMENTS OF ERROR

{¶ 9} Appellants filed a timely appeal, and they raise the following assignments of error:

> I. THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTIONS TO DISMISS PURSUANT TO OHIO CIVIL RULE 12(B)(6) TO THE EXTENT THAT IT

BASED ITS DECISION UPON THE APPLICABILITY OF OHIO REVISED CODE SECTION 1335.04, RATHER THAN OHIO REVISED CODE SECTION 1335.05, AND REFUSED TO CONSIDER WHETHER THE PARTIES' CONTRACT FOR PURCHASE AND SALE OF LAND WAS AN AGREEMENT THAT WAS TO BE PERFORMED WITHIN ONE YEAR FROM THE MAKING THEREOF.

II. THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTIONS TO DISMISS PURSUANT TO OHIO CIVIL RULE 12(B)(6) BASED UPON A FINDING THAT APPELLANTS' AMENDED COMPLAINT FAILED TO ALLEGE THE EXISTENCE OF AN AGREEMENT FOR PURCHASE AND SALE OF LAND MEMORIALIZED IN A SIGNED WRITING.

III. DISCUSSION

{¶ 10} We will address appellants' assignments of error together. Each argues that the trial court erred by granting appellees' motions to dismiss pursuant to Civ.R. 12(B)(6). A motion to dismiss for failure to state a claim is procedural and tests whether the complaint is sufficient. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). In considering a Civ.R. 12(B)(6) motion to dismiss, a trial court may not rely on allegations or evidence outside the complaint. *State ex rel. Fuqua v. Alexander*, 79 Ohio St.3d 206, 207 (1997). Rather, the trial court may only review the complaint and may dismiss the case only if it appears beyond a doubt that the plaintiff can prove no set of facts entitling the plaintiff to recover. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242 (1975), syllabus. Moreover, the court must presume that all factual allegations in the complaint are true and draw all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192 (1988). We review a trial court's dismissal for failure to state a claim upon which relief can be granted de novo. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5.

{¶ 11} The trial court held, and appellees argue here, that the statute of frauds precludes appellants' action to enforce the alleged agreement. In general, the term "statute of frauds" refers to a provision that requires that certain agreements be in writing. Where a plaintiff attempts to enforce an agreement against a defendant, the

defendant may raise the statute of frauds as an affirmative defense. Its purpose "is to prevent 'frauds and perjuries.' *Wilber v. Paine (1824), 1 Ohio 251, 255.* The statute does so by informing the public and judges of what is needed to form a contract and by encouraging parties to follow these requirements by nullifying those agreements that do not comply." *Olympic Holding Co., L.L.C. v. ACE Ltd.*, 122 Ohio St.3d 89, 2009-Ohio-2057, ¶ 33.

{¶ 12} As it applies to contracts concerning real estate, the statute of frauds ensures " 'that transactions involving realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transaction occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests.' " *Beaverpark Assoc. v. Larry Stein Realty Co.*, 2d Dist No. 14950 (Aug. 30, 1995), quoting *N. Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App.3d 342 (8th Dist.1984). Agreements that do not comply with the statute of frauds are unenforceable. *Olympic Holding* at ¶ 32, citing *Hummel v. Hummel*, 133 Ohio St. 520 (1938).

{¶ 13} Under Ohio law, R.C. 1335.04 and 1335.05 reflect these principles. R.C. 1335.04 provides that "[n]o * * * interest of, in, or out of lands * * * shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it." R.C. 1335.05 also provides:

> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; 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.

{¶ 14} While no model of clarity, R.C. 1335.05 expressly prohibits an action "upon a contract or sale of lands * * * unless the agreement upon which such action is

brought * * * is in writing and signed by the party to be charged therewith." Because appellants did not produce a written and signed agreement for the purchase of the property, or even allege that the agreement for the purchase of the property was in writing and signed by appellees, their action fails as a matter of law.

{¶ 15} Nevertheless, appellants contend that R.C. 1335.05 creates an exception to R.C. 1335.04 for real property-sale contracts that will be performed within one year. Again, R.C. 1335.05 provides: "No action shall be brought whereby to charge the defendant, upon a special promise, * * * *or upon an agreement that is not to be performed within one year from the making thereof*; unless the agreement upon which such action is brought * * * is in writing and signed by the party to be charged therewith." (Emphasis added.)

{¶ 16} Appellants seize upon the phrase "or upon an agreement that is not to be performed within one year" and conclude that, because R.C. 1335.05 does not prohibit actions on unwritten agreements if they will be performed within one year, they may bring an action to enforce the sale at issue here. To reach this conclusion, however, appellants overlook the explicit prohibition in R.C. 1335.05 against actions "upon a contract or sale of lands" without any limitation as to the time for performance. Applying that explicit prohibition here, appellants may not enforce the alleged unwritten agreement for the sale of real property. *See also Woodford v. Harrell*, 78 Ohio App.3d 216, 220 (10th Dist.1992) ("[T]he Statute of Frauds (R.C. 1335.04) prohibits the enforcement of a contract to purchase real estate unless such agreement is reduced to writing, properly executed and witnessed.").

{¶ 17} *Olympic Holding* does not require a different result. In that case, the Supreme Court of Ohio construed the "not to be performed within one year" clause within R.C. 1335.05 and stated that "[t]he statute of frauds applies to agreements that cannot be performed within a year. R.C. 1335.05. When parties to an alleged agreement did *not* intend the agreement to be performed in less than a year, the statute of frauds renders that agreement unenforceable." (Emphasis sic.) *Olympic Holding* at ¶ 48. The court did not have the opportunity to construe the "not to be performed within one year" clause against the prohibition against actions upon an unwritten agreement for the sale

of land, and nothing within *Olympic Holding* changes the application of the statute of frauds to the facts before us.

{¶ 18} Finally, appellants contend that, even if a writing is required, an allegation of a writing exists here. In support, appellants point to the following in paragraph 8 of their amended complaint: "On the same day, JLL sent Matan an e-mail asking 'what was the buying entity name that you would be purchasing the property under?' Matan replied to the email on November 30, 2010 indicating that the subject real property should be titled under the name of ELM Investments Inc. and that the purchase transaction would be a cash sale." This allegation does not indicate the existence of a written agreement. Rather, JLL's question asks what name "would be" used and indicates that an agreement had not yet been written. Matan's reply similarly identifies what the name "should be titled under" and states that the sale "would be" in cash, further evidence that an agreement did not yet exist.

{¶ 19} But even if we were to conclude that the email exchange satisfied the writing requirement, the complaint still would lack an allegation or evidence of a *signed* agreement, as R.C. 1335.04 and 1335.05 require. Therefore, even accepting appellants' contention that the complaint alleges the existence of a written agreement, the complaint would still fail as a matter of law.

{¶ 20} For all these reasons, we conclude that the trial court did not err by dismissing appellants' complaint. Accordingly, we overrule appellants' first and second assignments of error.

IV. CONCLUSION

{¶ 21} Having overruled appellants' assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.