



**Fourth Court of Appeals**  
**San Antonio, Texas**

**MEMORANDUM OPINION**

No. 04-15-00008-CV

**BAKKE DEVELOPMENT CORPORATION,**  
Appellant

v.

Eddie L. **ALBIN** and Kim A. Albin,  
Appellees

From the 216th Judicial District Court, Kendall County, Texas  
Trial Court No. 13-192  
Honorable Bill R. Palmer, Judge Presiding

**OPINION ON APPELLANT'S MOTION FOR REHEARING**

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice  
Patricia O. Alvarez, Justice  
Luz Elena D. Chapa, Justice

Delivered and Filed: October 19, 2016

**AFFIRMED**

On March 16, 2016, the court issued its opinion and judgment in this appeal. Appellant then filed a motion for rehearing. The motion for rehearing is denied, but we withdraw our opinion and judgment of March 16, 2016, and substitute this opinion and judgment in their stead.

Appellant Bakke Development Corporation ("Bakke Corp.") challenges the trial court's order granting summary judgment in favor of appellees Eddie L. Albin and Kim A. Albin. We affirm the judgment of the trial court.

## BACKGROUND

Eddie Albin owns a 65-acre tract of land located in Boerne, Texas, known as the Theis Property. Phillip P. Bakke, president of Bakke Corp., met with Albin to discuss the possibility of developing the property. As alleged in Bakke Corp.'s First Amended Original Petition, the parties formed a general partnership for the development and operation of the Theis Property as an apartment complex/mixed use development (hereinafter, the "Project"). According to Mr. Bakke, per the terms of the partnership, the parties orally agreed that:

- Albin would contribute the Theis Property to the partnership;
- Bakke Corp. would contribute to the partnership a retail shopping center and the associated real property known as the "Menger-Shumard Retail Center;"
- Bakke Corp. would pay debt associated with the Theis Property out of cash flow from the Menger-Shumard Retail Center and/or through the proceeds of debt financing obtained by Bakke Corp.;
- Bakke Corp. would develop and operate the Project; and
- Bakke Corp. and Albin would share equally the profits and losses of the Project.

Thereafter, Bakke Corp. allegedly began development of the Project, including obtaining plans and meeting with governmental officials to obtain the necessary approvals to commence the Project. Additionally, Bakke Corp. attempted to obtain financing for both the Project and the debt associated with the Theis Property. It is undisputed that the parties did not sign a writing embodying the terms of the alleged oral agreement; in fact, Mr. Bakke testified that he felt a signed agreement was unnecessary and claimed the parties solidified their agreement by ending their negotiations with a handshake.

Albin, however, later disclaimed the partnership and refused the partnership use of the Theis Property. Consequently, Bakke Corp. filed suit, alleging the parties had orally agreed to the formation of a general partnership and Albin breached the partnership agreement. Bakke Corp. alleged Albin used Bakke Corp. and the partnership to forestall a bank foreclosure on the property

until Albin could gain other resources to pay off an \$800,000 debt against the property and hold the property free and clear. Bakke Corp. asserted claims for breach of the partnership agreement and breach of fiduciary duty and requested that a constructive trust be imposed on the Theis Property.

In response to Bakke Corp.'s lawsuit, Albin filed a motion for summary judgment asserting that because the parties' alleged oral contract was an agreement to convey real property, the lack of a signed writing meant that the oral agreement violated the statute of frauds. Thereafter, Bakke Corp. amended its petition to add claims for fraud and unjust enrichment, as well as promissory estoppel and partial performance as exceptions to the application of the statute of frauds. The motion for summary judgment was denied by the trial court.<sup>1</sup>

Thereafter, Albin filed a "Motion for Partial Summary Judgment on Applicability of the Statute of Frauds" arguing that the statute of frauds prohibited enforcement of the oral agreement as a matter of law because (1) the agreement could not be performed within one year, (2) the agreement involved the transfer of an interest in land, (3) there was no signed writing, and (4) no exception, including partial performance, applied to prevent application of the statute of frauds. Bakke Corp. filed a response. The trial court granted the partial summary judgment motion and adjudged that "the Texas 'statute of frauds,' Texas Business and Commerce Code Section 26.01, applies to the oral agreement alleged by Plaintiff in this cause and prohibits judicial enforcement of that agreement under any theory or cause of action for which the statute of frauds is a defense recognized under law."

Thereafter, Albin filed his "Second Hybrid Motion for Summary Judgment and Motion for Partial Summary Judgment in the Alternative." Based on the trial court's prior ruling that the

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<sup>1</sup> The Honorable Stephen B. Ables signed the order denying Albin's first motion for summary judgment on April 22, 2014.

statute of frauds barred the oral partnership agreement, Albin asserted that the partnership agreement was unenforceable as a matter of law.<sup>2</sup> As no-evidence grounds, he argued that there was no evidence to support Bakke Corp.'s claims for breach of the partnership agreement, breach of fiduciary duty, fraud, constructive trust, and unjust enrichment. Bakke Corp. filed a response, and Albin filed a reply as well as objections to Bakke Corp.'s summary judgment evidence. After considering the parties' filings, the trial court granted the hybrid motion for summary judgment in its entirety without specifying its grounds. Bakke Corp. timely appealed.

### STANDARD OF REVIEW

We review the trial court's grant of summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Willmann v. City of San Antonio*, 123 S.W.3d 469, 472 (Tex. App.—San Antonio 2003, pet. denied). In a traditional motion for summary judgment, the movant bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A defendant who conclusively negates at least one of the essential elements of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). We take as true all evidence favorable to the non-movant and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Navy v. Coll. of the Mainland*, 407 S.W.3d 893, 898 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

### DISCUSSION

On appeal, Bakke Corp. challenges the summary judgment ruling only as it pertains to the breach of partnership agreement claim. Bakke Corp. contends the trial court improperly subjected the parties' oral partnership agreement to the statute of frauds because (1) the agreement can be

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<sup>2</sup> On appeal, Bakke Corp. challenges the summary judgment ruling only as it pertains to the breach of partnership agreement claim.

performed in less than one year, and (2) the agreement does not involve the conveyance of real estate. Alternatively, it argues that equity prevents the application of the statute of frauds because Bakke Corp. partially performed under the agreement.

Whether a contract comes within the statute of frauds is a question of law, which we review de novo. *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426 (Tex. 2015). However, whether the circumstances of a particular case fall within an exception to the statute of frauds, such as partial performance, is generally a question of fact. *Berryman's S. Fork, Inc. v. J. Baxter Brinkmann Int'l Corp.*, 418 S.W.3d 172, 192-93 (Tex. App.—Dallas 2013, pet. denied). The statute of frauds provides that certain contracts must be in writing and signed by the party against whom enforcement is sought. See TEX. BUS. & COM. CODE ANN. § 26.01(a) (West 2015). “The purpose of the Statute of Frauds is to remove uncertainty, prevent fraudulent claims, and reduce litigation.” *Givens v. Dougherty*, 671 S.W.2d 877, 878 (Tex. 1984). A contract for the sale of real estate falls within the statute of frauds and must be in writing to be enforceable. TEX. BUS. & COM. CODE ANN. § 26.01(b)(4) (West 2015). Additionally, an agreement which is not to be performed within one year from the date of the making of the agreement must be in writing. *Id.* § 26.01(b)(6).

We first address whether the partnership agreement involved the sale of real estate. Bakke Corp. contends that the partnership was formed for the purpose of jointly developing real property and did not require the conveyance of the Theis property. In support, it cites to *Sewing v. Bowman*, 371 S.W.3d 321, 330 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd), in which the court held that “[m]erely because a partnership agreement contemplates transactions in real estate does not transform the partnership itself into a transaction for the sale of real estate, bringing it under the statute of frauds.” Among the evidence attached to Bakke Corp.’s summary judgment response was the affidavit of Mr. Bakke. Mr. Bakke averred that although the partnership agreement required Albin to contribute the Theis Property for development,

[a]t no time was it necessary for the Theis Property to be conveyed by deed to the partnership. The agreement required Albin to contribute the use of his property for the development of the Theis Property into an apartment complex/mixed use development. We did not discuss or agree to the literal conveyance of the Theis Property by way of a deed at the time of the formation of the partnership[.]

These statements, however, are contrary to those made by Mr. Bakke in his deposition.

Mr. Bakke testified as follows:

Q: And you've made good on all your obligations [under the alleged partnership agreement]?

A: I believe I have.

Q: Though you haven't conveyed the property to the partnership?

A: I'm ready, willing, and able.

Q: Okay. But you have not done it yet?

A: By deed record? No.

Mr. Bakke's testimony regarding a "deed record" belies the contention that the partnership merely required "use" of the Theis property and that a conveyance of land was not required under the agreement. To the contrary, Mr. Bakke's testimony shows that the "contribution" of the respective properties would take place through a formal conveyance to the partnership. Bakke Corp.'s pleadings further support Albin's claim that the alleged oral agreement contemplated the transfer of property. Bakke Corp.'s First Amended Original Petition contends that the Theis Property is "an asset" of the partnership over which Bakke Corp. continues to seek imposition of a constructive trust. "[A]n interest in real estate cannot become a partnership asset unless the agreement concerning the property is in writing the same as any other contract concerning the sale of land." *Carpenter v. Phelps*, 391 S.W.3d 143, 153 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Thus, we conclude that despite Bakke Corp.'s insistence that the agreement required nothing more than use of the Theis Property, the agreement could not be effectuated without a transfer of an interest in the land, and thus it falls within the statute of frauds. *See Palmer v. Fuqua*, 641 F.2d 1146, 1158 (5th Cir. 1981) ("the Statute of Frauds generally applies when 'the performance promised requires an act that will transfer property in land'") (internal citation omitted). Having concluded that the

oral agreement's contemplation of the transfer of property rights to the partnership falls within the statute of frauds, we need not address Albin's claim that the agreement is barred by the statute of frauds because it could not be performed within one year.

We now address Bakke Corp.'s alternative contention that, even assuming the statute of frauds applies, it would be unconscionable to allow Albin to gain from his wrongful conduct because Bakke Corp. partially performed under the agreement. Once the defendant conclusively establishes his statute of frauds affirmative defense, the burden shifts to the plaintiff to establish an exception. *Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 642-43 (Tex. 2013); *see also Winkenhower v. Smith*, No. 04-15-00077-CV, 2015 WL 6900306, at \*5 (Tex. App.—San Antonio Nov. 10, 2015, no pet.) (mem. op.) (holding once appellee established the applicability of the statute of frauds, the burden shifted to appellant to show why summary judgment should not be granted by raising a fact issue on partial performance exception). “Under the partial performance exception to the statute of frauds, contracts that have been partly performed, but do not meet the requirements of the statute of frauds, may be enforced in equity if denial of enforcement would amount to a virtual fraud.” *Berryman's S. Fork, Inc.*, 418 S.W.3d at 192. “The fraud arises when there is strong evidence establishing the existence of an agreement and its terms, the party acting in reliance on the contract has suffered a substantial detriment for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit.” *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 439 (Tex. App.—Dallas 2002, pet. denied). “The partial performance must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made. The performance a party relies on to remove a parol agreement from the statute of frauds ‘must be such as could have been done with no other design than to fulfill the particular agreement sought to be enforced.’ Without such precision, the acts of performance do not tend to prove the

existence of the parol agreement sought to be enforced.” *Berryman’s S. Fork, Inc.*, 418 S.W.3d at 193 (citations omitted, quoting *Breezevale*, 82 S.W.3d at 439).

In its response to Albin’s motion for summary judgment, Bakke Corp. argued a fact issue existed as to whether partial performance should serve as an exception to the application of the statute of frauds and attached the affidavit of Mr. Bakke:

Immediately after entering into the partnership agreement and in reliance on the partnership agreement, Bakke began to perform under the terms of the agreement. That is, Bakke spent innumerable hours meeting or conferring with elected and other city of Boerne officials, bankers, U.S. Department of Housing officials, engineers, architects, and mortgage bankers. As part of the performance of the agreement, Bakke arranged financing of approximately \$2,500,000 to provide capital for the purpose of developing the project. As a result of Albin’s repudiation of the agreement, extremely valuable U.S. Department of Housing and Urban Development, non-recourse, market rate financing has been lost. In addition, Bakke has expended thousands of dollars towards the development of the Theis property[,] including fees for surveying, engineering, legal fees, architecture, consultants, and mortgage banker related fees. All of this was performed for the purpose of developing the Theis Property per the parties’ agreement.

Albin replies that Bakke Corp. provided no evidence that its limited actions can be attributed solely to the alleged general partnership agreement because, as Mr. Bakke explained in his deposition, at the same time Bakke Corp. was undertaking these actions, it was also in negotiations with Albin to form a limited partnership to develop the Theis property. In his deposition, Mr. Bakke testified that, in addition to the general partnership at issue here, he was in negotiations with the Albins to enter into a limited partnership specifically for the purpose of “perfect[ing] the financing that we were trying to put together and bring to the table.” He continued to explain the parties “needed a written document of some vehicle, whether it was a limited partnership or the agreed-upon general partnership, to take to the bank in order to close on the financing we had in place.” However, as Mr. Bakke explained in his affidavit, all of the actions Bakke Corp. undertook after entering into the general partnership agreement were “performed for the purpose of *developing* the Theis Property” (emphasis added). The actions were not undertaken



solely for the purpose of securing financing, which was the stated purpose for entering into the limited partnership. Thus, Albin is incorrect in arguing that Bakke Corp.'s actions were solely referable to the limited partnership.

Nevertheless, Bakke Corp. has failed to show that if the agreement is not enforced, Albin, as the breaching party, "would reap an unearned benefit." *See Breezevale*, 82 S.W.3d at 439. Nowhere in his affidavit or deposition testimony does Mr. Bakke contend that Albin reaped or would reap an unearned benefit such that not enforcing the partnership agreement would amount to a virtual fraud. *See Zeecon Wireless Internet, LLC v. McEwen*, No. 03-08-00214-CV, 2010 WL 521111, at \*3 (Tex. App.—Austin Feb. 12, 2010, no pet.) (mem. op.) (burden is on party seeking to establish exception to statute of frauds that breaching party would reap an unearned benefit or that non-breaching party would have no adequate remedy for a substantial harm). Bakke Corp. does not point to any evidence suggesting that development occurred on the Theis Property or that Albin received any plans, drawings, or consideration in cash or kind from Bakke Corp. Accordingly, on this record, we conclude Bakke Corp. failed to meet its burden of raising a fact issue on the partial performance exception to the statute of frauds. *See Winkenhower*, 2015 WL 6900306, at \*5.

#### CONCLUSION

Having overruled Bakke Corp.'s issues on appeal, we affirm the judgment of the trial court.

Rebeca C. Martinez, Justice