TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00318-CV

Brian Mitchell and Clark Mitchell, Appellants

v.

Kirk Mitchell, Appellee

FROM COUNTY COURT AT LAW NO. 1 OF COMAL COUNTY
NO. 2011PCA0414, HONORABLE RANDAL C. GRAY, JUDGE PRESIDING

MEMORANDUM OPINION

This is an appeal from the trial court's judgment ordering specific performance of an alleged agreement among Brian Mitchell, Clark Mitchell, and Kirk Mitchell regarding disposition of certain real property and other assets in which they each have ownership interests. The trial court concluded that the parties' agreement was enforceable under the statute of frauds and that any failure to comply with the agreement could not be adequately remedied by monetary damages. Brian and Clark[1] assert on appeal that the trial court erred in concluding that the alleged agreement met the requirements of the statute of frauds and was enforceable. They also argue that the trial court erred by ordering specific performance of the agreement. We will reverse and render judgment that Kirk take nothing.

[1] Because the parties share a surname, we will refer to them by their given names for clarity.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Kirk, Brian, and Clark are the sons of Issac Newton Mitchell and June Gass Mitchell. The family lived on a ranch in Comal County ("the Newton Ranch") until Newton and June divorced in the mid-1980s at which time June moved with her sons to Gass family ranch property. June relinquished any interest she had in the Newton Ranch. June's parents had created various trusts as estate planning vehicles during their lifetimes, and the real property interests June and her sons inherited from June's parents were ultimately transferred into a limited partnership called Gass Ranch, Ltd. After living on Gass family ranch property and being actively involved in the affairs of Gass Ranch, Ltd. for a number of years, Kirk had a falling out with June in 2006 and, as a result, he and his family began living at the Newton Ranch. In the years that followed Kirk had very little contact with Brian and Clark. In 2011, Newton's health began to deteriorate and he died in October of that year. Prior to Newton's death, Kirk and his wife Kellie had assisted Newton with transportation to medical appointments, grocery shopping, and meal preparation. They also served as his primary caretakers and provided him financial assistance.

During the period before Newton's death, Kirk, Brian, and Clark's relationship had improved and, on the day their father died, the brothers met to discuss their father's passing and the funeral arrangements. Kirk testified that during that meeting he proposed that if Brian and Clark would give him their interests in the Newton Ranch, he would pay for Newton's medical and funeral expenses and give Brian and Clark his interest in (1) Gass Ranch, Ltd.; (2) mineral rights in Jackson County owned by Newton; and (3) Guadalupe Valley Telephone Cooperative capital credit accounts

[2] The facts set forth herein are derived from the testimony and exhibits admitted at trial.

and Pedernales Electric Cooperative capital credit accounts owned by Newton. In addition, Brian and Clark could have any tools from Newton's shop at the Newton Ranch that they wanted. Kirk suggested that Brian and Clark think about it and let him know whether they would agree to the proposed exchange of property interests.

Over the next few months Kirk handled the funeral arrangements for Newton and was appointed administrator of his estate. Kirk was in regular communication with Brian and Clark about various matters, including the proposed exchange of property interests discussed in October. On November 17, 2011, Kirk sent the following email to Brian and Clark:

> Good morning, Gentlemen
>
> Mr. Zipp[3] would like to meet with us to talk about him completing an "Administration" for Daddy's estate. As I understand from reading on the Internet, an "Administration" is used when there is not a will available. They have checked their records in the office and didn't find anything either—only the draft they completed this past spring.
>
> In a previous email I told him what we have tentatively agreed on regarding the trade of partnership interest.
>
> I just talked to his assistant who gave me the following open appointment times for next week. My calendar is open Tuesday and Wednesday so I can be flexible for your needs. Just a suggestion: The last appointment of the day would burn less vacation time.

Brian responded to this email stating "sounds good to me" after which Kirk informed Brian and Clark that he had scheduled the appointment with Mr. Zipp for Wednesday, November 23. On

[3] Ron Zipp was an attorney assisting with the administration of Newton's estate.

November 18, Kirk forwarded an email he had previously sent to Mr. Zipp that included the following:

> I worked out a deal with Brian and Clark assuming there is no will, or if there is a will, my dad wanted everything divided equally three ways. I told them I would continue paying for his medical bills, pay for all of the funeral expenses, they could have whatever tools they need from my dad's shop, and I would transfer to each of them my interest in the Gass Ranch Family partnership if they would let me keep all of my dad's ranch. They both agreed.

On February 20, 2012, Kirk sent an email to Mr. Zipp titled "Tentative Settlement Agreement." Kirk wrote: "I drafted an agreement as we discussed for my brother's [sic] and I to sign. Please review and provide any feedback you may have." The attachment, which was titled "Memorandum for Record," recited the following:

> Re: Tentative Settlement Agreement between heirs of the Isaac N. Mitchell V Estate
>
> On October 25, 2011, after the death of our dad, Isaac N. Mitchell V, my brothers, Brian & Clark, and I met to discuss funeral arrangements at my house. I informed them that our dad didn't have any extra money and that I had been paying for various living expenses, such as groceries, clothing, medical & prescription co-pays, and utilities. I also told them there was not a will to my knowledge. I proposed the following to my brothers:
>
> 1. I told them that the following proposal may not be fair if they looked at it only from the perspective of our dad's estate but, it would be more than fair if you look at it from the perspective of both of our parents' estates.
>
> 2. I offered them the following:
>
> > a. I would pay for remaining medical bills and co-pays for our dad (which we are still receiving).
> >
> > b. I would pay for the funeral expenses (which I did and, included my brothers in all decisions).

c. I would relinquish my 1/3 interest and let them divide the capital credits from Guadalupe Valley Telephone Cooperative and Pedernales Electric Cooperative. (Pending estate administration).

d. I would relinquish my 1/3 interest and let them divide mineral rights with oil lease royalties from Jackson County, TX. (Pending estate administration).

e. I would relinquish to them my 10% interest of Gass Ranch, LTD family partnership from our mother's side of the family. (Pending estate administration and settlement of grandparents' estate on mother's side).

f. They could have any tools they might need from our dad's shop.

3. In return for my offer under bullet #2 above, they would let me keep the entirety of our dad's ranch.

Both Brian and Clark agreed to my proposal and verbally reaffirmed this agreement at our first meeting with Mr. Ronald Zipp on November 23, 2011.

Sincerely,

Kirk I. Mitchell

Agree / Disagree

Brian F. Mitchell

Agree / Disagree

Clark J. Mitchell

On February 23rd, Kirk forwarded to Brian and Clark an email from Mr. Zipp's assistant in which, with regard to the "Memorandum for Record," she stated that Mr. Zipp "said that it needs to be signed and notarized if at all possible." Then on February 24, Kirk sent an email to Brian and Clark attaching an initial draft of an inventory of property taken from Newton's house and stating:

Also attached for your review is a draft of the agreement we made verbally. I made it as close to our discussion as I could remember. Mr. Zipp requested we put it in writing and send it to him. I would like to meet at Randolph Brooks Federal Credit

> Union, at Bulverde Crossing, at 9:00 AM tomorrow (2/25) to sign the agreement and have it notarized.

The attached document entitled "Memorandum for Record" was substantially similar to the draft Kirk had earlier forwarded to Mr. Zipp, but the two closing paragraphs were changed to state:

> 3. Brian and Clark will in return relinquish their interest in our dad's ranch and improvements to me to stay as they are.
>
> Approximately two weeks after our dad's passing, I followed up with Brian and Clark about the above proposal. Both Brian and Clark agreed and we verbally reaffirmed this agreement at our first meeting with Mr. Ronald Zipp on November 23, 2011.

The same day, Clark sent the following reply to Kirk's email:

> I just spoke with Brian, and he said the agreement looks ok, but thinks that where it states about the tools in the shop it should also state about anything we end up with other than tools.
>
> Also . . . he said that he has plans tomorrow and won't be able to make it.[4]

The following morning Kirk responded to Clark's email as follows:[5]

> Good morning,
>
> The previous agreement was an accurate (exact) account of what we initially discussed and agreed upon. There have not been any discussions about changing the terms of that agreement until now. Brian has suggested that it be changed to include

[4] It is apparent from the context that Clark was relaying to Kirk that Brian would not be able to meet the next morning at the Randolph Brooks Federal Credit Union to sign the "Memorandum for Record" as Kirk had requested.

[5] This email was sent to Clark, Brian, and Mr. Zipp.

more than just tools for he and Clark. Bottom line is that wasn't the original agreement. Brian even added to the original agreement by stating "He didn't need anything."

As you can see by the inventory that was attached to the previous email Brian and Clark have not been limited to tools. We had been dividing things up based upon need and if there was something that we didn't need it was donated to the Hope Center in Spring Branch. The process is beginning to evolve into "that would be nice to have" or "I might be able to use that someday." I have expressed concern about there not being enough goods to sell to fund the estate and reimburse expenses paid. I do not plan to hoard our dad's belongings to myself. There is too much to keep.

I added a few points to the attached revised agreement for clarification.

From now on, if there are any questions or concerns regarding the business of the estate send me an email to put it in writing. These emails will serve as written record for you and for me. Of course you can contact Mr. Zipp directly as I have included his email address.

It has been suggested that I have presented this agreement to stop any further division of our dad's belongings. Mr. Zipp told us to put an agreement in writing when we met at his office on November 23, 2011 and has asked me about it a few times since.

Thank you,

Kirk

The attached revised "Memorandum for Record" added the following:

4. This agreement also serves as a settlement for possible litigation that was in progress by my attorneys Gass Ranch, LTD to partition my 10% interest. I paid attorneys $6,890.00 to drop the issue due to this agreement.

5. I will not be receiving any property, equipment, tools, etc. from Gass Ranch, LTD.

Since November 2011, we have been working through our dad's house, garage, and shops by cleaning, sorting, and dividing up some of his belongings. My brothers have taken things such as clothes, dishes, building supplies, tractors, and more. They have not been limited to taking tools from the shop. Inventories are available for reference.

> To date, I have fronted all expenses for the estate adding up to $3296.00 from my personal funds with the expectation that the estate will reimburse at a later date.

The revised document also included the "Agree / Disagree" language above signature blocks for both Brian and Clark. On February 26, Clark sent an email to Kirk that stated: "Brian and I would like for all 3 of us to meet with Mr. Zipp so we can all be on the same page, and can discuss anything that might not be setting right with us regarding the agreement and how to move forward from here." Brian also sent Kirk an email stating: "I think we need to meet with mr. zip to restart communication. I asked you the week end before last what your plans were and you mention[ed] you might have to work. So I made plans for myself. I see that there has been a big misunderstanding and tension has risen. To avoid any conflict I think it would be best to visit with mr. zip."

In March 2012, Kirk sent Mr. Zipp an email that stated, in part, that "if [Brian and Clark] won't go back to the agreement we had for the land swap, I think we should also liquidate [the estate] in that scenario. I was hoping to preserve our dad's ranch but, I can't think of a more equitable and expedient way to settle this than to liquidate." In April 2012, the brothers proposed to meet at a local restaurant to "begin our task of moving forward" with estate administration. Then, on April 11, Kirk sent Brian and Clark an email stating:

> I stayed home sick from bronchitis Monday and Tuesday. Today I went back to work and seem to be on the mend. I was considering meeting with you all at Limestone Grill but, after giving it further thought, I think it would be best to keep our discussions in writing.
>
> I'll start the discussion with my questions below.
>
> 1. We had an agreement, do you all plan to sign it? Thoughts or concerns?

2. You all took property of the estate home with you. Why won't you provide inventories (complete) of the items?

3. What would you like to discuss?

Talk to you later . . .

Kirk

Kirk filed suit against Brian and Clark in October 2012 alleging that they breached an agreement for the distribution of their father's estate in a manner different from Texas law regarding intestate distribution. According to Kirk, the terms of that agreement were as set forth in the February 25 version of the "Memorandum for Record." Kirk sought specific performance of the brothers' agreement as memorialized in that document along with attorneys' fees. Clark and Brian filed a general denial and asserted, as an affirmative defense, that enforcement of the alleged agreement was barred by the statute of frauds. *See* Tex. Bus. & Com. Code § 26.01 (certain promises or agreements are not enforceable unless promise or agreement, or memorandum of it, is in writing and signed by person to be charged with promise or agreement or by someone lawfully authorized to sign for him).

Before trial, Brian and Clark filed a motion for summary judgment arguing that there was no evidence of a signed written agreement necessary to satisfy the statute of frauds and that, consequently, Kirk sought to enforce an unenforceable oral contract for the conveyance of real estate. Brian and Clark also asserted that there was no evidence that any of the exceptions to the statute of frauds existed. *See, e.g.*, *National Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 426 n.2 (Tex. 2015) (discussing equitable "partial performance" exception to statute of frauds);

Nagle v. Nagle, 633 S.W.2d 796, 800 (Tex. 1982) (courts will enforce oral promise to sign instrument complying with statute of frauds if elements of promissory estoppel are met). Kirk responded that there were writings sufficient to satisfy the statute of frauds and that the signature requirement was met by virtue of the Uniform Electronic Transactions Act. *See* Tex. Bus. & Com. Code §§ 322.001-.021 (UETA). The trial court denied Brian and Clark's motion for summary judgment.

The case was tried to a jury over three days in March 2017. At trial, the jury heard the testimony of Kirk, Brian, and Clark, and the email exchanges among the brothers and Mr. Zipp were admitted as exhibits. After Kirk rested, Brian and Clark moved for a directed verdict on the ground that, as a matter of law, the court could not enforce an agreement for the conveyance of real estate that was not in writing and signed by the persons to be charged, and that there was no evidence to support any exception to the statute of frauds such as partial performance or promissory estoppel. After the trial court denied the motion for directed verdict, Brian and Clark rested without calling any witnesses, and the case was submitted to the jury. The jury returned a verdict in which it answered the following question "Yes" as to both Brian and Clark:

> Did Brian and/or Clark agree with Kirk ("Agreement") that:
>
> 1. Kirk would receive all of Dad's Ranch; and
> 2. Kirk would have to pay Dad's medical and funeral expenses; and
> 3. Brian and Clark would receive in equal shares:
>   a. Kirk's ownership interest in Gass Ranch, Ltd.;
>   b. Dad's GVTC and PEC credit monies;
>   c. Dad's Jackson County mineral rights; and
>   d. Any tools from Dad's shop they might need.

The jury also answered the following question "No" as to both Brian and Clark:

> Did Kirk substantially rely to his detriment on Brian and/or Clark's promise to sign a written document containing the material terms of the Agreement, and was this reliance by Kirk foreseeable by Brian and/or Clark?

The jury found that Brian and Clark repudiated the Agreement, failed to comply with it, and that Kirk was ready, willing, and able to perform his obligations under the Agreement and would have done so but for the repudiation by Brian and Clark. Brian and Clark then moved for entry of judgment that the defense of the statute of frauds applied as a matter of law and, because the jury found against Kirk on his counter-defense of promissory estoppel, that Kirk take nothing by his claims against Brian and Clark. For his part, Kirk moved for entry of judgment on the jury's verdict and requested a finding by the trial court that the writings evidencing the "Agreement" were sufficient to satisfy the statute of frauds. Kirk also requested the trial court to find that Brian and Clark's failure to comply with the "Agreement" could not be adequately remedied by monetary damages and to order specific performance of the "Agreement."

After a hearing, the trial court signed the judgment in the form submitted by Kirk, and this appeal followed. In four issues, Brian and Clark contend that the judgment was erroneous because (1) it enforced a contract that was unenforceable under the statute of frauds, (2) there was no evidence to show facts necessary to take the contract out of the operation of the statute of frauds, (3) it ordered specific performance of an agreement that was unenforceable and that Kirk did not have the present ability to perform, and (4) there was no evidence that Brian and Clark accepted an agreement in terms identical to those offered by Kirk.

DISCUSSION

The parties agree that the "Agreement" enforced by the trial court fell within the scope of the statute of frauds and, consequently, it was required to be in writing and signed by Brian and Clark. The jury failed to find that the "Agreement" was enforceable on a promissory estoppel theory, and Kirk does not challenge the jury's finding on appeal. Instead, Kirk insists that "the compendium of documents exchanged between Kirk, Clark and Brian over the course of three months combined with an audio recording of the brothers' discussion of the agreement constituted a signed memorandum sufficient to satisfy the statute of frauds as a matter of law." Because it is dispositive, we first consider whether the evidence establishes that the signature requirement of the statute of frauds was met.

As discussed above, neither Brian nor Clark ever signed any version of the "Memorandum for Record" that Kirk prepared to memorialize the agreement he contends he and his brothers reached regarding disposition of the Newton Ranch and other assets of Newton's estate. Brian and Clark maintain that the record contains no signed agreement that satisfies the statute of frauds, and that Kirk failed to secure a jury finding on any exception to the statute of frauds. *See Dynegy, Inc. v. Yates*, 422 S.W.3d 638, 641 (Tex. 2013) (once applicability of statute of frauds is established, party seeking to avoid statute must plead, prove, and secure findings as to exception). Kirk counters that the signature requirement has been met by virtue of emails sent by Brian and Clark. Relying on the Uniform Electronic Transactions Act, Kirk argues that these electronic communications supply both the terms of the agreement and constitute Brian and Clark's signatures to the agreement. *See* Tex. Bus. & Com. Code §§ 322.001-.021. Specifically, Kirk points

to section 322.007(d), which provides: "If a law requires a signature, an electronic signature satisfies the law." *Id.* § 322.007(d). As an initial matter, the Act provides:

> This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.[6]

Id. § 322.005(b). Even were we to assume that an agreement relating to the disposition of Newton's estate constituted a "transaction" as defined in the Act, there is no indication that Kirk, Brian, and Clark agreed to conduct, memorialize, or finalize any such "transaction" regarding their father's estate by electronic means. To the contrary, the record reflects that the brothers discussed the form of a written agreement, the "Memorandum for Record," and Kirk expressed his expectation and desire that Brian and Clark sign that document. The Act has no application in the present case.

Kirk also argues that Brian's and Clark's name or email address in the "from" field in their emails to him function as their signature for purposes of the statute of frauds. To support this proposition, Kirk relies on *Khoury v. Tomlinson*, a case in which the court of appeals considered whether the information in a "from" field in an email could authenticate the writing contained in the email to be that of the sender. *See* 518 S.W.3d 568, 576-79 (Tex. App.—Houston [1st Dist.] 2017, no pet.). In *Khoury*, the court first noted that the parties agreed that their email correspondence was governed by the UETA and that the parties agreed to transact electronically. The court then held

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[6] The Uniform Electronic Transactions Act defines "transaction" as "an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs." Tex. Bus. & Com. Code § 322.002(15).

that Tomlinson's email address in the "from" field of an email in which he stated that he was "in agreement" with the terms of an agreement emailed to him from Khoury satisfied the signature requirement for the electronic transaction. *Id.* at 576-77. Because the *Khoury* court's analysis relies entirely on application of the UETA to the transaction at issue, it has no bearing on the present case. Moreover, the record here includes no email from Brian or Clark that purports to agree to the terms of any agreement regarding the disposition of Newton's estate. Although Clark sent an email to Kirk stating that Brian thought one draft of the "Memorandum for Record" looked "ok," the same email stated that Brian required changes to the agreement—i.e., "that where it states about the tools in the shop it should also state about anything we end up with other than tools." In response to this request Kirk prepared additional drafts of the "Memorandum for Record" that modified and added additional terms, none of which were affirmed by Brian or Clark, electronically or otherwise. And, Kirk's later email querying whether Brian and Clark intended to sign the "Memorandum for Record" belies his contention that any previous emails from Brian or Clark were intended to constitute their signatures on that document. We conclude that the email communications from Brian and Clark do not satisfy the signature requirement of the statute of frauds.

Kirk also argues on appeal that a party's intent to be bound by a contract may be evidenced by conduct consistent with the contractual terms. But to the extent Kirk is arguing that Brian and Clark's conduct served to except their agreement from the statute of frauds, he did not secure the required jury findings. *See Dynegy, Inc.*, 422 S.W.3d at 641. Instead, the jury rejected the submitted promissory estoppel theory, and Kirk did not submit any other questions that would provide a basis for enforcing the otherwise unenforceable agreement, such as partial performance.

See, e.g., *National Prop. Holdings, L.P.*, 453 S.W.3d at 426-27 & n.2 (discussing equitable "partial performance" exception to statute of frauds).

We conclude that the statute of frauds renders unenforceable the agreement regarding disposition of Newton's estate that Kirk sought to enforce. Consequently, Kirk cannot, as a matter of law, recover on his breach of contract claim. We sustain Brian and Clark's first issue.[7]

CONCLUSION

Having concluded that any agreement among the parties regarding the disposition of their father's estate is unenforceable for failure to satisfy the signature requirement of the statute of frauds, we reverse the trial court's judgment and render judgment that Kirk take nothing on his claims against Brian and Clark.

Scott K. Field, Justice

Before Justices Puryear, Field, and Bourland

Reversed and Rendered

Filed: February 16, 2018

[7] Because of our disposition of Brian and Clark's first issue, we need not address their remaining issues.