IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHUN CHA CHI, an individual, Appellant, v. MAXCARE OF WASHINGTON, INC., a Washington corporation, Respondent.	No. 41606-9-II UNPUBLISHED OPINION

Johanson, J. – Chun Cha Chi appeals the trial court's summary judgment dismissal of her breach of contract claim against MaxCARE of Washington, Inc. She argues that the trial court erred when it determined that the claim was barred by the statute of limitations that applies to oral, rather than written, contracts. Because Chi failed to establish a question of fact as to whether there was a written contract, we affirm**.**

FACTS

In May 2005, there was a fire in Chi's home. Allstate, Chi's insurance company, had MaxCARE contact Chi regarding the cleaning and storage of her fire damaged property.

On June 1, 2005, Chi signed a "Service Authorization/Contract" (the authorization form)

with MaxCARE. *See* Clerk's Papers (CP) at 18. The authorization form was a one-page document containing (1) Chi's address; (2) Chi's signed authorization allowing MaxCARE "to proceed with work at the above listed job location"; (3) an unsigned authorization that would have allowed Chi's insurance company to pay MaxCARE "directly for the repairs listed on the repair estimate"; and (4) a required notice/disclosure statement regarding licensing, registration, and bonding information. CP at 29. The authorization form did not specify the type of work MaxCARE was to perform, how MaxCARE was to perform the work, the scope of the work, when MaxCARE was to perform the work, or the cost of the work.

Four years later, on June 1, 2009, Chi sued MaxCARE for breach of an "implied contract" and unfair or deceptive business practices under chapter 19.86 RCW. CP at 7. Chi alleged that (1) she never gave MaxCARE any "'work authorization'" detailing the work MaxCARE was to perform, the compensation, or how the work was to be done; (2) MaxCARE advised her that she "was to rely upon [MaxCARE's] direction regarding storing, cleaning, and repairing items damaged in her home by the fire"; (3) MaxCARE never informed her of "the full and actual scope of the work intended to be done"; and (4) MaxCARE misrepresented to Chi that it was acting under Allstate's direction and that she was required to "acquiesce to their actions" under the terms of her insurance policy. CP at 3. She further alleged that MaxCARE removed personal property from her home without her authorization, failed to prepare an inventory of all the items it was removing from her home, did not allow her to review any inventories before they removed the property, took possession of jewelry valued at more than $100,000 without listing these items on an inventory, failed to return this jewelry, asserted that the missing jewelry was "lost," and

never compensated her for the missing jewelry. CP at 4. She asserted that MaxCARE misrepresented its authority under the insurance policy, failed to provide safeguards to ensure that employees did not lose or steal her property, performed unnecessary and/or incomplete work, and then held her property until MaxCARE was paid for the services it provided. Throughout her original pleadings, Chi repeatedly asserted that the authorization form was not a contract and that she at no time entered "into any type of written or oral contractual relationship with [MaxCARE]." CP at 3.

MaxCARE moved for partial summary judgment on the breach of contract claim. Noting Chi's repeated assertions that she never entered into a contract with MaxCARE and asserting that the authorization form was not a contract, MaxCARE argued that her breach of contract claim was time barred under the three year statute of limitations for implied contract claims.

In response, Chi (1) notified the trial court that she intended to file an amended complaint claiming breach of a "written" contract, which would render the summary judgment motion moot; and (2) claimed that recent deposition testimony in an unrelated matter would establish that MaxCARE had asserted in other actions that it considered the authorization form to be a written contract for services. CP at 31. In support, Chi attached a copy of a complaint MaxCARE had filed in a separate King County action in which MaxCARE alleged breach of contract against another individual. She also stated that as soon as it became available, she intended to submit a copy of deposition testimony in which a MaxCARE representative stated that the authorization form was a contract between MaxCARE and the defendant in MaxCARE's King County case.

MaxCARE replied that the authorization form did not establish that there was a written

contract. It also argued that the King County case was not relevant because MaxCARE had not asserted that the authorization form was a written contract but, rather, that the authorization form and additional conversations and electronic correspondence created a contract. MaxCARE also noted that it had filed its King County lawsuit within three years of the alleged breach of contract.

In support of its argument, MaxCARE supplied a transcript of the deposition Chi had referred to in her briefing. In the transcript, MaxCARE employee Robin A. Hamilton stated that the basis of MaxCARE's contract claim was "the service authorization *and the conversations that transpired and e-mails that transpired after the authorization*." CP at 94 (emphasis added). Hamilton further characterized the agreement between MaxCARE and the other party as the written "service authorization *and then verbal*." CP at 95 (emphasis added). And she emphasized that the agreement in that case was reached after on-site discussions between the other party, herself, an insurance adjuster, and another MaxCARE employee.

Chi also filed a motion to amend her complaint to "include a claim for breach of written contract now that Defendant [MaxCARE] has produced an [sic] Service Authorization/Contract." CP at 50. The trial court granted Chi's motion to amend the complaint over MaxCARE's objection.

In her amended complaint, Chi asserted that the authorization form created a "contractual relationship." CP at 112. Although she admitted that the authorization form did not "detail what work was to be done, rate of compensation for such work, or the manner in which the work was to be done," she asserted that her insurance company and MaxCARE told her that "she was to rely on [MaxCARE]'s their [sic] direction regarding storing, cleaning, and repairing items

damaged in her home by the fire." CP at 112. She also alleged that "[MaxCARE] deems the Service Authorization/Contract to be a written contract upon which [MaxCARE] performs work at the fire damaged residence" and that a MaxCARE representative had so testified in the other matter. CP at 115. Chi further asserted that "[t]he terms of the contract were, at a minimum, for the removal, cleaning, safe storage, and return of property to Ms. Chi." CP at 118.

Chi then renewed her opposition to MaxCARE's partial summary judgment motion. This time, she argued that she had established that her contract claim was based on a written contract, so the three-year statute of limitations did not apply. MaxCARE continued to assert that there was no written contract as a matter of law and that the statute of limitations had expired. The trial court granted MaxCARE's motion for partial summary judgment, dismissing Chi's breach of contract claim. Later, the trial court granted the parties' stipulated order of dismissal of the remaining claims without prejudice. Chi appeals the trial court's order granting partial summary judgment and dismissing her contract claim.

ANALYSIS

Chi argues that the trial court erred when it concluded that there was no written contract and applied the three-year statute of limitations rather than the six-year statute of limitations to her contract claim. We disagree.

We review summary judgment orders by engaging in the same inquiry as the trial court. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). We consider all facts and reasonable inferences from them in the light

most favorable to the nonmoving party. *Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 693, 169 P.3d 14 (2007). Our review is limited to the record before the trial court at the time it ruled on the motion for summary judgment. RAP 9.12; *Wash. Fed'n of State Emps., Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993); *Green v. Normandy Park*, 137 Wn. App. 665, 677-78, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008).

> RCW 4.16.040(1)[1] provides that an "action upon a contract in writing, or liability express or implied arising out of a written agreement" must commence within six years. RCW 4.16.080(3)[2] provides that a nonwritten contract-based action must commence within three years.
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> " 'The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.'" [*Bogle & Gates, PLLC v. Holly Mountain Res.*, 108 Wn. App. 557, 560, 32 P.3d 1002 (2001) (quoting *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42, *review denied*, 99 Wn.2d 1012 (1983)).] "The essential elements of a contract are 'the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.' " [*Holly Mountain Res.*, 108 Wn. App. at 561 (quoting *DePhillips v. Zolt Constr. Co. Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104 (1998)).]
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> " 'A written agreement for purposes of the 6-year statute of limitations must contain all the essential elements of the contract, and *if resort to parol evidence is necessary to establish any essential element, then the contract is partly oral and the 3-year statute of limitations applies*.' " [*Holly Mountain Res.*, 108 Wn. App. at 562 (quoting *Cahn*, 33 Wn. App. at 840–41).][3] "Ex parte writings are sufficient to bring a contract within the 6-year statute of limitations if the writing contains all of the elements of a contract." [*Kloss v. Honeywell, Inc.*, 77 Wn. App. 294, 298, 890 P.2d 480 (1995) (written employment contract found where, although ex parte memoranda lacked an express compensation term, reasonable

[1] The legislature amended RCW 4.16.040(2) in 2007. Laws of 2007, ch. 124, § 1. The 2007 amendment is not relevant to this appeal.

[2] The legislature amended RCW 4.16.080 in 2011. Laws of 2011, ch. 336, § 83. This amendment merely inserted gender neutral language and is not relevant to this appeal.

[3] *See also DePhillips*, 136 Wn.2d at 31 ("If parol evidence is necessary to establish any material element [of the contract], then the contract is partly oral and the three-year statute of limitations in RCW 4.16.080(3) applies.").

compensation term was implicit in the writings).]

Bogle & Gates, PLLC v. Zapel, 121 Wn. App. 444, 448-49, 90 P.3d 703 (2004).

Neither the authorization form's reference to "work at the above listed job location," nor anything else on the authorization form, describes the subject matter of the contract, the nature or scope of the work to be performed, or the agreed to consideration for the work. CP at 29. Thus, the authorization form alone is clearly insufficient to qualify as a written agreement under RCW 4.16.040(1). Nor did Chi present any evidence in support of her opposition to the summary judgment motion suggesting that there were other writings that could be combined with the agreement to establish a written agreement under RCW 4.16.040(1).[4] At best, she alleged there were oral representations that established a contract's elements and that there was some evidence that MaxCARE considered the authorization form, additional oral representations, and email messages sufficient to establish a contract in another case.[5] Chi failed to establish that there is a

[4] Chi argues that additional evidence such as inventory lists, invoices, and payments from Allstate to MaxCARE establish that there was a written contract. Br. of Appellant at 18 (citing CP at 236-43). But MaxCARE produced these documents in response to Chi's August 12, 2010 interrogatories and requests for production, well after the trial court granted summary judgment on the contract claim in March 2010, and these documents were not before the trial court when it considered the first summary judgment motion. Because we review summary judgment rulings de novo, based on the record before the trial court at the time it addressed the motion, we do not consider these additional documents. RAP 9.12; *Wash. Fed'n of State Emps., Council 28*, 121 Wn.2d at 157; *Green*, 137 Wn. App. at 677-78.

[5] Chi argues that there was evidence that there was a "meeting of the minds" on the terms of the contract, specifically, the nature of the "work" to be performed. Br. of Appellant at 15. But nothing Chi presented to the trial court demonstrated that there were any *writings* establishing these terms. The fact parol evidence may have shown that the parties defined the terms of the contract and demonstrated a "meeting of the minds" does not establish the existence of a *written* contract. *See DePhillips*, 136 Wn.2d at 31.

question of fact as to whether there was a written agreement. Accordingly, the trial court did not err when it concluded that the three-year statute of limitations applied and granted summary judgment in favor of MaxCARE on Chi's contract claim.

MaxCARE requests attorney fees under RAP 18.9(a), asserting that this is a frivolous appeal. We deny this request, but award MaxCARE costs as the prevailing party under title 14 RAP.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Hunt, J.

Penoyar, C.J.