

NOTICE  
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2017 IL App (5th) 160260-U

NO. 5-16-0260

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE  
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

EMERICK FARMS, a General Partnership;	)	Appeal from the
FAYETTE FARMS, a General Partnership;	)	Circuit Court of
and BENJAMIN EMERICK, Individually,	)	Fayette County.
	)	
Plaintiffs-Appellees,	)	
	)	
v.	)	No. 12-L-8
	)	
JAMES E. MARLEN and JOANN MARLEN,	)	
Individually, and JAMES E. MARLEN,	)	
as Trustee of the James E. Marlen and	)	
JoAnn Marlen Declaration of Trust Dated	)	
January 27, 2010,	)	Honorable
	)	Michael D. McHaney,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.  
Presiding Justice Moore and Justice Welch concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* After a bench trial, the circuit court improperly entered money judgment in plaintiffs’ favor on their breach of oral contract counts.
- ¶ 2 The plaintiffs, Emerick Farms and Fayette Farms, both general partnerships, along with Benjamin Emerick, filed an action in the circuit court of Fayette County, alleging damages against the defendants, James E. Marlen and JoAnn Marlen, individually, and

James E. Marlen, as trustee of the James E. Marlen and JoAnn Marlen Declaration of Trust, dated January 27, 2010 (the Trust), for breaching oral agreements to lease lands to the plaintiffs for farming. After a bench trial, the circuit court found that the defendants breached the oral lease agreements, and the circuit court entered judgment in the plaintiffs' favor for \$264,830.80, which included lost profits and costs. For the following reasons, we reverse the circuit court's judgment, and we remand the cause for further proceedings.

¶ 3

### BACKGROUND

¶ 4 In the plaintiffs' second-amended complaint, filed on August 19, 2013, the plaintiffs alleged that on October 18, 2011, James verbally agreed to allow Emerick Farms to lease for farming 254 tillable acres, known as the Augsburg St. James Farm, in Fayette County, from January 1, 2012, to December 31, 2013, under the terms shown summarized in an "Amendments to Lease" dated October 14, 2010, and attached to the complaint. The "Amendments to Lease" was not signed by any of the defendants. The plaintiffs alleged that on October 18, 2011, James also verbally agreed to allow Fayette Farms to lease for farming 531 acres, known as the Butts Engele Farm, in Fayette County, from 2012 through 2013 under terms summarized in an "Illinois Cash Farm Lease," which was attached to the complaint. The "Illinois Cash Farm Lease" was also not signed by any of the defendants.

¶ 5 The plaintiffs alleged that during conversations on October 6, 2011, Benjamin, acting as tenant and on behalf of both of the plaintiff partnerships, verbally advised James that he needed to apply fall fertilizer and perform fall tillage on the two farms, and James

authorized and consented to the purchase and application of such fertilizer and tillage on the farms, based upon the parties' verbal agreement and mutual understanding that the plaintiffs would farm the properties in 2012 and 2013. The plaintiffs alleged that Emerick Farms and Fayette Farms thereby provided and obtained fertilizer application and fall tillage for each of the farm properties, in contemplation and in reliance on the renewal or continuance of the farm leases for the 2012 farming year.

¶ 6 The plaintiffs alleged that on December 9, 2011, James sent a letter to Benjamin disregarding the agreements previously reached. The plaintiffs alleged that this letter was received before lease renewals had been signed by both parties, but after the tillage and fertilizer were supplied on the two farms. The plaintiffs alleged that the defendants thereafter refused to perform the lease agreements and leased the property to another tenant farmer.

¶ 7 The plaintiffs alleged that their conduct in providing fertilizer and tillage constituted a significant partial performance in reliance on the oral agreements reached between the parties. Specifically, in count I, Fayette Farms and Benjamin sought judgment against James and JoAnn for \$79,463.18 for tillage and fertilizer provided for the Butts Engele Farm and for lost income damages of \$212,000 caused by the breach of the lease agreement. In count II, Emerick Farms sought judgment against James and the Trust for damages of \$41,719.71 for fall tillage and fertilizer applied to the Augsburg St. James Farm and for loss of profits of \$100,000 caused by the breach of the lease agreement.

¶ 8 In count III, entitled “Quasi-Contract, Unjust Enrichment, Quantum Meruit,” Emerick Farms alternatively alleged that in the event the court should find that the lease agreement described in count II was unenforceable, the court should nevertheless require James and the Trust to pay \$41,719.71 for the reasonable value of the fall tillage and fertilizer application on the Augsburg St. James Farm. Emerick Farms alleged that James and the Trust would be unjustly enriched to retain the benefits without compensating Emerick Farms for the benefits provided under the reasonable belief that it would be farming the land in the upcoming farm year.

¶ 9 In count IV, entitled “Quasi-Contract, Unjust Enrichment, Quantum Meruit,” Benjamin and Fayette Farms alternatively alleged that if the court found the oral lease agreement described in count I unenforceable, the court should nevertheless require James and JoAnn to pay \$79,463.18 for the reasonable value of the fall tillage and fertilizer application on the Butts Engele Farm. Benjamin and Fayette Farms alleged that James and JoAnn would be unjustly enriched to retain the benefits without compensating Benjamin and Fayette Farms for the benefits provided under the reasonable belief that they would be farming the land in the upcoming farm year.

¶ 10 On November 7, 2013, the defendants filed an answer to counts III and IV of the plaintiffs’ second-amended complaint. On the same day, the defendants filed a motion for involuntary dismissal of counts I and II of the plaintiffs’ second-amended complaint. See 735 ILCS 5/2-619 (West 2012). In their motion, the defendants claimed that the plaintiffs’ claims were unenforceable pursuant to the statute of frauds found in the Illinois Frauds Act. 740 ILCS 80/2 (West 2012). On December 3, 2013, the circuit court denied

the defendants' motion to dismiss counts I and II. The court found that the plaintiffs' allegations of performing work constituted part performance to and reliance on the oral agreement, sufficient to bar the application of the statute of frauds. Thereafter, on January 23, 2014, the defendants filed their answer to counts I and II of the plaintiffs' second-amended complaint.

¶ 11 On March 14, 2016, the circuit court heard evidence on the plaintiffs' claims. The evidence revealed that in 2011, pursuant to written agreements, Benjamin and Emerick Farms leased the farm ground at issue from the defendants, but the written leases terminated by their terms on December 31, 2011. On November 3, 2011, as a result of discussions between James and Benjamin, James sent a proposed, unsigned written lease to Benjamin, but Benjamin did not return the paperwork because he was busy in the field. The proposed leases were not signed by any of the defendants. Thereafter, on December 9, 2011, James notified the plaintiffs that he would not be renewing the leases and advised the plaintiffs to disregard the forms sent on November 3, 2011.

¶ 12 At trial, the evidence also revealed that fall tillage involved turning over the weeds and farm residue on the property, mixing the material with the earth to release the nutrients into the ground and to enhance the deterioration of the material, in preparation for spring planting. The evidence suggested that the plaintiffs expended funds for tillage and fertilizer for the property in October 2011, prior to receiving notice that James would not be renewing the leases.

¶ 13 After the bench trial, the circuit court stated that it was "resolving credibility in favor of the plaintiffs and against the defendant[s]." The court further stated that "there

was specific performance to take this out of the statute of frauds.” The circuit court stated that it was “granting judgment in favor of the plaintiffs for the full amount asked for plus costs.”

¶ 14 On March 21, 2016, the circuit court entered written judgment in favor of the plaintiffs and against the defendants, finding that the defendants breached the amendments to the lease for extension of the Illinois Cash Farm Lease for the Augsburg St. James Farm for the period of January 1, 2012, to December 31, 2013, and the Illinois Cash Farm Lease for the Butts Engele Farm, for the period of January 1, 2012, to December 31, 2013. The circuit court awarded judgment in the amount of \$264,830. The circuit court’s award included lost profits of \$169,994 for the Augsburg St. James Farm in the 2012 and 2013 crop years, lost profits of \$94,696 for the Butts Engele Farm in the 2012 and 2013 crop years, and costs of \$140.

¶ 15 On April 15, 2016, the defendants sought leave to amend their answer to the plaintiffs’ second-amended complaint to include the affirmative defense of the statute of frauds, and the circuit court granted the defendants’ motion for leave to amend their answer on May 24, 2016. On April 15, 2016, the defendants also filed a motion to reconsider the circuit court’s judgment. In their motion to reconsider, the defendants noted that because the plaintiffs and the defendants did not execute written leases, the circuit court implicitly found that the parties entered into an oral lease and that partial performance removed applicability of the statute of frauds. The defendants argued, however, that the doctrine of partial performance did not apply because the plaintiffs

sought money damages. On May 24, 2016, the circuit court denied the defendants' motion to reconsider. On June 17, 2016, the defendants filed their notice of appeal.

¶ 16

#### ANALYSIS

¶ 17 On appeal, the defendants argue, *inter alia*, that the circuit court erred in entering judgment for the plaintiffs on counts I and II because their actions for breach of an oral contract to lease land are barred by the statute of frauds. The defendants contend that the doctrine of partial performance, which in cases of equity may remove an oral contract from the statute of frauds, is not available because the plaintiffs alleged and offered proof of an adequate remedy at law. The plaintiffs counter that the defendants have forfeited the issue because they failed to properly raise it in the circuit court. Alternatively, the plaintiffs argue that the circuit court properly held that their partial performance removed the oral lease agreement from the statute of frauds.

¶ 18 The plaintiffs recognize that the defendants raised the statute of frauds defense in their November 7, 2013, motion to dismiss counts I and II of the plaintiffs' second-amended complaint. See *Armagan v. Pesh*, 2014 IL App (1st) 121840, ¶ 38, n.1 (statute of frauds constitutes an affirmative matter outside of the facts alleged in a complaint and should be raised in a motion to dismiss pursuant to section 2-619(a)(7) of the Code of Civil Procedure); 735 ILCS 5/2-619(a)(7) (West 2012). The plaintiffs filed their motion to dismiss along with their answer to counts III and IV of the second-amended complaint and prior to filing their January 23, 2014, answer to counts I and II of the plaintiffs' second-amended complaint. See *Fox v. Seiden*, 2016 IL App (1st) 141984, ¶ 51 (affirmative defense is properly raised at or before the time to answer the complaint). In

their motion to dismiss, the defendants alleged that the plaintiffs' claim to damages based upon breach of a verbal agreement was unenforceable under the provisions of the statute of frauds. In rejecting the defendants' statute of frauds defense, the circuit court held that the plaintiffs' "part performance pursuant to the oral agreement and in reliance upon the oral agreement" barred the application of the statute of frauds. After the bench trial, in their motion to reconsider, the defendants argued that the circuit court improperly applied the doctrine of partial performance to remove the oral lease agreement from the statute of frauds because the doctrine of partial performance cannot remove the statute of frauds bar in actions at law for monetary damages. Again, the circuit court rejected the defendants' contention. On appeal, the plaintiffs argue that the defendants waived this particular argument regarding the enforceability of the statute of frauds by failing to raise it prior to their motion to reconsider.

¶ 19 Although "[a]rguments raised for the first time in a motion for reconsideration in the circuit court are forfeited on appeal" (*Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 36), the defendants previously raised their statute of frauds defense in their motion to dismiss. To the extent that the defendants argued the bar of the statute of frauds more expansively in their motion to reconsider, this argument properly addressed the circuit court's error in its application of the law. Accordingly, the defendants did not forfeit their statute of frauds defense on appeal because they properly asserted it before the circuit court and the plaintiffs were not taken by surprise. See *Harvey v. McKinney*, 221 Ill. App. 3d 140, 142 (1991) ("The law in this State is well established that if a defendant wishes to assert an affirmative defense such as the statute of frauds at trial, he



is required to specifically plead it so that the plaintiff is not taken by surprise.”). We therefore conclude that the defendants sufficiently raised this issue before the circuit court and did not forfeit it for purposes of appellate review.

¶ 20 The conveyance of the right to enter upon the land for the purpose of farming is a conveyance of an interest in the land itself. Contracts conveying land or an interest therein are required to be in writing pursuant to the statute of frauds, which provides as follows:

“No action shall be brought to charge any person upon any contract for the sale of lands, \*\*\* or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing[ ] and signed by the party to be charged therewith \*\*\*.” 740 ILCS 80/2 (West 2012).

The statute of fraud’s purpose is to preserve any existing interest in land from the chances of uncertainty and fraud attending the admission of parol evidence. *IMM Acceptance Corp. v. First National Bank & Trust Co. of Evanston*, 148 Ill. App. 3d 949, 956 (1986). “The statute of frauds defense is a substantive defense which defeats the cause of action.” *Cain v. Cross*, 293 Ill. App. 3d 255, 258 (1997).

¶ 21 The doctrine of part performance is an equitable doctrine developed and applied in those cases where a party is seeking the equitable remedy of specific enforcement. *Phillips v. Britton*, 162 Ill. App. 3d 774, 781 (1987); see also *Anderson v. Kohler*, 397 Ill. App. 3d 773, 786 (2009) (“partial performance is an equitable doctrine, and the only contractual relief it affords is specific performance”). “The equitable remedy of specific

performance requires a party to perform an affirmative act to fulfill a contract.” *Butler v. Kent*, 275 Ill. App. 3d 217, 227 (1995).

“The basis upon which the doctrine of partial performance rests is, that when a verbal contract has been made and the promisor has knowingly permitted the promisee to do acts in part performance of the agreement, in full reliance upon it, which would not have been done without the agreement, and which are of such nature as to change the relations of the parties and prevent a restoration to their former condition or an adequate compensation for the loss to the promisee by a judgment at law for damages, then it is a fraud in the promisor to interpose the [s]tatute of [f]rauds as a bar to the completion of the contract and thus secure for himself all the benefits of the acts done in part performance, while the promisee not only loses all advantage from the bargain but is left without adequate remedy for its failure or compensation for what he has done in pursuance of it.” *Flannery v. Woolverton*, 329 Ill. 424, 431 (1928).

In other words, to remove the bar of the statute of frauds, partial performance must be such that it is impossible to compensate the performing party for the value of his performance, so that any refusal to complete the engagement would constitute a fraud on the performing party. See *Prodromos v. Howard Savings Bank*, 295 Ill. App. 3d 470, 476 (1998); see also *Roti v. Roti*, 364 Ill. App. 3d 191, 197 (2006) (the partial performance must be of such a character that it is impossible or impractical to compensate the performing party for the value of his performance).

¶ 22 Accordingly, although acts of partial performance may be sufficient to remove an oral agreement from the operation of the statute of frauds in an action at equity, acts of partial performance do not remove an action at law from the operation of the statute of frauds. *Cohn v. Checker Motors Corp.*, 233 Ill. App. 3d 839, 845 (1992); *Sjogren v. Maybrooks, Inc.*, 214 Ill. App. 3d 888, 892 (1991); Restatement (Second) of Contracts § 129 cmt. c (1981). Indeed, this court has consistently held that the doctrine of part performance is not applicable in actions at law for money damages. *John O. Schofield, Inc. v. Nikkel*, 314 Ill. App. 3d 771, 784 (2000) (party seeking application of equitable principles to defeat interposition of statute of frauds must establish that promise cannot be made whole by money damages); *Cain*, 293 Ill. App. 3d at 259 (doctrine of part performance is not applicable in actions at law for money damages); *Phillips*, 162 Ill. App. 3d at 781 (doctrine of part performance may not be invoked to sustain an ordinary action at law for damages for breach of contract); *Gibbons v. Stillwell*, 149 Ill. App. 3d 411, 415 (1986) (“partial performance of an oral contract does not take an action of law from the operation of the [s]tatute of [f]rauds”).

¶ 23 In arguing that partial performance may take an oral contract outside the statute of frauds, the plaintiffs cite *Tabora v. Gottlieb Memorial Hospital*, 279 Ill. App. 3d 108 (1996); *Melburg v. Dakin*, 337 Ill. App. 204 (1949); and *Anderson v. Collinson*, 300 Ill. App. 22 (1939). However, in *Tabora*, the appellate court concluded that the plaintiff-physician’s claim that he had an oral contract for a lifetime of two-year reappointments at the defendant-hospital was properly dismissed pursuant to the statute of frauds because the plaintiff had failed to allege sufficient partial performance. *Tabora*, 279 Ill. App. 3d

at 120. Further, *Melburg* and *Anderson* involved the defense of part performance in forcible entry and detainer suits, and as noted by the court in *Melburg*, equitable defenses may be asserted in a forcible entry and detainer proceeding. See *Melburg*, 337 Ill. App. at 211 (tenant may assert equitable defense of partial performance when plaintiff seeks possession under the forcible entry and detainer statute); *Anderson*, 300 Ill. App. at 26 (based on farmer's partial performance, court affirmed trial court order of specific performance of oral agreement to lease farm and writ of injunction restraining owner from prosecuting forcible entry and detainer suit). "A forcible entry and detainer action is a limited proceeding, focusing on the central issue of possession." *American National Bank v. Powell*, 293 Ill. App. 3d 1033, 1044 (1997). In none of these cases did the court hold that partial performance takes an oral contract outside the statute of frauds when an adequate monetary remedy is available.

¶ 24 In this case, the plaintiffs alleged that they and the defendants entered into a verbal contract to lease the two parcels of land for two years. This oral contract, never executed as a written agreement, fell within the purview of the statute of frauds. See 740 ILCS 80/2 (West 2012). The plaintiffs argued that their partial performance in performing fall tillage and fertilizing services to the lands removed their oral contract from the purview of the statute of frauds pursuant to the doctrine of partial performance. However, in the plaintiffs' second-amended complaint, the plaintiffs pecuniarily estimated the value of their alleged partial performance, the tillage and fertilizing services, in the amounts of \$41,719.71 and \$79,463.18. Thus, as alleged, the plaintiffs' partial performance was of such a character that the plaintiffs could be adequately compensated for the value of their

services. To remove the bar of the statute of frauds, partial performance must be such that it is impossible to compensate the performing party for the value of their performance. See *Roti*, 364 Ill. App. 3d at 197; *Prodromos*, 295 Ill. App. 3d at 476.

¶ 25 Moreover, pursuant to each breach of contract claim, the plaintiffs sought, and the circuit court entered judgment for, monetary damages for lost profits as a result of the defendants' failure to honor the oral agreement for which they claimed partial performance. Because the plaintiffs alleged an adequate remedy at law for damages, the doctrine of partial performance could not operate to remove the plaintiffs' breach of oral contract action to convey an interest of land from the purview of the statute of frauds. See *Gibbons*, 149 Ill. App. 3d at 415. Accordingly, the circuit court improperly invoked the doctrine of partial performance to sustain the plaintiffs' action at law for money damages for breach of an oral contract. See *John O. Schofield, Inc.*, 314 Ill. App. 3d at 784-85; *Cain*, 293 Ill. App. 3d at 259; *Phillips*, 162 Ill. App. 3d at 781. The plaintiffs' breach of oral contract actions, found in counts I and II of their complaint, were barred by the statute of frauds and should have been dismissed on the defendants' motion.

¶ 26 After the bench trial, without delineating on which counts it was entering judgment, the circuit court implicitly entered judgment on counts I and II, finding that the defendants "breached the [a]mendments to lease for \*\*\* the Augsburg St. James Farm \*\*\* for the period of January 1, 2012 to December 31, 2013 \*\*\* and \*\*\* for the Butts/Eng[e]le Farm \*\*\* for the period of January 1, 2012 to December 31, 2013." The circuit court awarded judgment in favor of the plaintiffs in the total amount of \$264,830.80, which included lost profits and costs. The circuit court failed to address

counts III and IV, which were actions pled in the alternative to counts I and II, and which sought recovery for the reasonable value of the tillage and fertilizer that the plaintiffs alleged unjustly benefitted the defendants' property. Accordingly, for the foregoing reasons, we reverse the circuit court's order entering judgment in the plaintiffs' favor on counts I and II, and we remand the cause for the circuit court to consider the evidence in light of the plaintiffs' allegations in counts III and IV of their second-amended complaint.

¶ 27

#### CONCLUSION

¶ 28 For the reasons stated, we reverse the judgment of the circuit court of Fayette County, and we remand for further proceedings consistent with this order.

¶ 29 Reversed and remanded.