No. 1-10-0876



SIXTH DIVISION
June 30, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| BRONISLAW CHMIEL,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>S.V.B. PROPERTIES, INC,<br><br>Defendant-Appellant. | ) | Appeal from the Circuit Court of Cook County<br><br>2002 CH 20334<br><br>Honorable Stuart Palmer, Judge Presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Justice Cahill and Justice R. E. Gordon concurred in the judgment.

ORDER

*HELD*: The judgment of the circuit court of Cook County was affirmed where the alleged sale of plaintiff's property was barred by the statute of frauds.

Defendant, SVB Properties, appeals from an order of the circuit court of Cook County finding that an alleged sale of a piece of property owned by plaintiff, Bronislaw Chmiel, to defendant was barred by the statute of frauds and quieting title to the property in plaintiff's name.

On appeal, defendant contends that the trial court's findings were against the manifest weight of the evidence presented at trial. For the reasons that follow, we affirm.

Plaintiff filed a ninth amended complaint on February 20, 2009, seeking to quiet title on a piece of properly located at 2415 West Augusta Street in Chicago, Illinois.[1] The complaint alleged that the property was held in a Chicago Title land trust and that plaintiff was the sole beneficiary and person authorized to direct the trust. In March 2002, Chicago Title was presented with written direction to convey the property to defendant and contained plaintiff's purported signature. A trustee's deed was subsequently recorded transferring title to the property to defendant. Wayne Berman, defendant's president, claimed to have negotiated to purchase the property with an attorney, Frank Weiss, who represented that he was acting on plaintiff's behalf.

The complaint further alleged that there was no written contract for the sale of the property, that the signature on the letter of direction was a forgery, and that Weiss did not have authority to act on plaintiff's behalf. Plaintiff also claimed that he did not negotiate or receive a $100,000 check which defendant claimed it wrote to plaintiff as consideration for the property. Plaintiff therefore requested a declaratory judgment to quiet title against defendant and any nonrecord claimants, that the transfer of title to defendant be "unrecorded," and that title to the property be returned to plaintiff's land trust.

In response, defendant acknowledged that there was no written contract for the sale of the property and that plaintiff did not negotiate the $100,000 check. Defendant argued, however, that the direction to convey was signed by plaintiff. As an affirmative defense, defendant argued

[1]The complaint named SVB and other parties as defendants. However, only the count directed at SVB is relevant to this appeal.

that Weiss, acting as plaintiff's agent, offered to sell the property to defendant and that Weiss had authority to act based upon three prior transactions.

Trial began on February 23, 2009. Among the documents admitted into evidence was the "Direction to Convey" dated March 8, 2002. It directs Chicago Title to execute and deliver the trustee's deed for the property to defendant and to deliver the deed to Wayne Berman. The direction to convey contains plaintiff's alleged signature and the "received by" line is signed by the letters "WB." The trustee's deed was also admitted into evidence. It was dated March 11, 2002, and purports to convey the property from the trust to defendant. Another document admitted was a limited power of attorney in which plaintiff appointed Thaddeus Gauza as his attorney-in-fact and authorized him to sell or otherwise dispose of any real or personal property in which plaintiff had an interest.

Defendant's president, Wayne Berman, testified that he initially discussed purchasing the property from plaintiff in 2001 but that plaintiff was uncertain if wanted to sell the property at that time. He had subsequent conversations with Weiss in 2001 and 2002 about purchasing the property, the last of which occurred in March 2002. During that conversation, Weiss asked Berman if $100,000 was an acceptable purchase price for the property. When asked by counsel if Weiss ever showed him that he had written authorization to act on plaintiff's behalf, Berman testified that he did and that Weiss showed him the direction to convey signed by plaintiff. Berman met Weiss again on March 8, 2002, and gave him $10,000 cash for his services relating to purchasing the property. He also gave Weiss a "counter check" for $100,000 that was made out to plaintiff as the purchase price for the property. In return, Weiss gave Berman the original direction to convey the property. Berman presented the direction to convey to Chicago Title on

March 8, 2002, and received the trustee's deed for the property on March 11. Berman recorded the trustee's deed on July 12, 2002.

Berman also testified that he had no written proof of the $100,000 check to plaintiff and that he did not obtain a receipt when he gave the check to Weiss. That check was not numbered because it was a counter check and the check was still outstanding. He claimed he regularly used counter checks and that he used one to purchase the property because when Weiss contacted him on March 8 to ask him if he wanted to close the deal, he did not have his check book with him and so he met Weiss at his bank and obtained the check. Berman acknowledged that it was customary for a seller in a real estate transaction to pay his or her own attorney's fees but testified that it was not customary in deals involving Weiss. Weiss passed away in May of 2002. Berman testified that during the spring of 2002 he learned that plaintiff was out of the country from December 2001 through June 2002. However, he was unaware of this at the time he purchased the property. He did not take any steps to cancel the check once the lawsuit was filed and he learned that the check had not been cashed.

Berman acknowledged that he did not obtain title insurance on the property and that his lawyer obtained a title commitment during a prior negotiation for the property. He did not obtain a title commitment when he purchased the property from Weiss to cover the period that had lapsed. However, he explained that he looked at the "grantor-grantee" index at the "County building." Berman did not purchase insurance for the property even though a tenant lived on the property and he did not take any steps to investigate that tenancy. He explained that he only bought the property for land value and was not interested in improvements to it. No inspection was made when he purchased the property and no provisions were made for the proration of real

estate taxes. Berman did not pay utilities or real estate taxes on the property. He received no keys to the property and did not cause the utilities to be transferred to his name.

Plaintiff testified that he was a Roman Catholic priest and that in 1995 he became pastor of St. Helen's church in Chicago, Illiniois. He remained in that position until December 2001, when he went on a six-month sabbatical in Israel. While on sabbatical, he appointed Thaddeus Gauza to act as his attorney-in-fact and gave Gauza a limited power of attorney authorizing him to sell any real or personal property in which plaintiff had an interest. Upon his return to the United States in June 2002, plaintiff learned of the alleged sale of the property and filed the present lawsuit.

Plaintiff further testified that he had never retained Weiss to represent him in any matter and that he did not grant Weiss the authority to sell the property on his behalf. Plaintiff did not sign the March 8, 2002, direction to convey the property to defendant and he testified that he was in Jerusalem, Israel on that date. Plaintiff did not receive a check or any money from Berman or defendant from the sale of the property.

Plaintiff testified that at all relevant times Evelyn Ogielga was the principal at St. Helen's school and that she also acted as business manager for the church and the school. Ogiela lived in the church rectory from 1999 to 2001 and, along with a housekeeper, had access to plaintiff's private office during that time. Plaintiff never authorized Ogiela to sign his name to any documents but at some point he learned that she had been doing so and discussed the matter with her. He testified that a number of other documents, including the trust agreement relating to the property at issue in this case, contained what appeared to be his signature but that he did not sign those documents. Ogiliea prepared all of the documents regarding sales or transfers of property.

Alice Swiergul testified that she was a volunteer at St. Helen's church while plaintiff was pastor. On one occasion, Swiergul was at the church with Ogiela and plaintiff when Ogiela mentioned that she could reproduce plaintiff's signature. Ogiela then signed plaintiff's name on a piece of paper and Swiergul testified that the reproduction was "absolutely perfect." When Swiergul asked how she could reproduce a signature so perfectly, Ogielia explained that she could do so because she had taken art classes.

Plaintiff then rested his case and the court denied defendant's motion for a directed verdict. Defendant called Ellen Schuetner as its first witness. The trial court qualified Schuetner as an expert forensic document examiner qualified to render an opinion concerning signatures and handwriting. Schuetner testified that she was hired to determine the authenticity of plaintiff's alleged signature on certain documents. She compared all of the documents presented to her that contained plaintiff's known signature with the signature on the questioned documents, one of which was the direction to convey. Schuetner concluded that in her opinion it was "highly probable to probable that the person who wrote the known Bronislaw Chmiel signatures on the known documents also executed the Bronislaw Chmiel signatures on the questioned documents." She explained that "highly probable to probable" meant that she was "virtually certain" that the known documents and the questioned documents were executed by the same person. Moreover, she did not observe any characteristics of forgery in the signatures on the questioned documents.

Following closing arguments, the trial court found in favor of plaintiff. First, the court found that the alleged sale of the property to defendant was barred by the statute of frauds for lack of a written contract or written authorization for Weiss to act on plaintiff's behalf. The court also quieted title to the property in plaintiff's name. This appeal followed.

We review a trial court's decision following a bench trial to determine if the judgment is against the manifest weight of the evidence. *Gambino v. Boulevard Mortage Corp.*, 398 Ill. App. 3d 21, 51 (2009). A judgment is against the manifest weight of the of the evidence only if the opposite conclusion is clearly evident. *Gambino*, 398 Ill. App. 3d at 51.

Defendant contends that the trial court erred in holding that the alleged sale of the property was barred by the statute of frauds. Defendant initially claims that the trial court improperly raised the statute *sua sponte.* Defendant bases this claim on the following.

Plaintiff rested his case on March 5, 2009, and defendant then moved for a directed finding. While the parties argued whether Weiss had apparent authority to act on plaintiff's behalf, the court asked, "Why isn's the statute of frauds involved in this case?" Defendant's counsel responded that the $100,000 check Berman wrote to plaintiff took the case out of the statute of frauds. Plaintiff's counsel argued that it was undisputed that the check was never cashed and that there was no evidence other than Berman's testimony indicating that the check had been tendered to plaintiff. The court stated:

> "All right. So I got to tell you, I'm not going to rule on this at this moment, but I'm very close to ruling that this transaction is barred by the Statute of Frauds.
>
> If you're telling me that the only thing that takes this out of the Statute of Frauds is Mr. Berman's testimony that he handed a check to Mr. Weiss that was never cashed, that's not going to be enough for me. That's not going to be enough for me. That's not performance.

So I'm just telling you it's not the appropriate time to rule on that, but it's out there. And at the end of your case, you're going to have to brief that issue."

After defendant presented its case and prior to the court announcing its judgment, the parties filed motions addressing, among other things, whether the Statute of Frauds applied to the case. Plaintiff argued that the sale of the property was barred under the statute because there was no written contract for the sale of the property and because Weiss did not have written authorization from plaintiff to sell the property on his behalf. Defendant argued in its memorandum that the statute of frauds provided that "no action shall be brought to charge any person upon any contract for the sale of lands *** unless such contract *** shall be in writing, and signed by the party to be charged therewith." 740 ILCS 80/2 (West 2008). Defendant claimed that the statute was inapplicable in this case because plaintiff had not brought an action to charge defendant upon a contract for the sale of land and that defendant was not raising the statute as a defense to such a claim. To the contrary, defendant claimed, plaintiff was attempting to "overturn a consummated transaction" and the statute could not be used to overturn the sale of the property because to do so would amount to an improper use of the statute as a "sword" instead of a "shield." Defendant further argued that plaintiff had not referred to the statute of frauds and that the statute was inapplicable because defendant had fully performed under the contract for the sale of the property. Finally, defendant claimed that it had obtained a deed regarding the sale of the property and that transfer of title by way of the deed merged the contract into the deed and removed the case from the statute.

Under the Statute of Frauds, a contract for the sale of land is unenforceable unless it is in

writing, is signed by the party against whom enforcement is sought, and contains a description of the property and the terms of sale, including the price and manner of payment. *Hubble v. O'Connor*, 291 Ill. App. 3d 974, 983 (1997). The statute states:

> "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments 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, or some other person thereunto by him lawfully authorized in writing, signed by such party." 740 ILCS 80/2 (West 2002).

In arguing that plaintiff waived the statute, defendant relies upon the rule that the statute of frauds is an affirmative defense that must be specifically pled by the party attempting to invoke it. *Chapman v. Brokaw*, 225 Ill. App. 3d 662, 665 (1992); 735 ILCS 5/2-613(d) (West 2002). If the party fails to do so, the defense is deemed to have been waived and it cannot be considered even if the evidence suggests the existence of the defense. *Harvey v. McKinney*, 221 Ill. App. 3d 140,142 (1991). Moreover, where the statute of frauds is not specifically pled, a trial court cannot consider the defense *sua sponte*. *Haas v. Cravatta*, 71 Ill. App. 3d 325,328 (1979).

The purpose of the requirement that the statute be specifically pled is to avoid surprise to the opposing party. *Athans v. Williams*, 327 Ill. App. 3d 700, 705 (2002); *Holladay v. Boyd*, 285 Ill. App. 3d 1006 (1996). Section 2-613(d) of the Code of Civil Procedure (the Code) specifically states that "any ground or defense, whether affirmative or not, which, if not expressly stated in the pleading, would be *likely to take the opposite party by surprise*, must be plainly set

forth in the answer or reply." (Emphasis added.) 735 ILCS 5/2-613(d) (West 2002).

These principles are illustrated by the holding in *Haas*, where the plaintiff brought suit for specific performance or the possession of property based upon the defendant's failure to pay the balance of the purchase price due under an allegedly oral contract. *Haas*, 71 Ill. App. 3d at 327. The statute of frauds was not raised prior to or during trial. Nevertheless, when announcing its verdict, the trial court stated that the parties' agreement was required to satisfy the statute of frauds before the court could determine whether to award specific performance. *Haas*, 71 Ill. App. 3d at 328. The trial court found that the agreement did not satisfy the statute and awarded plaintiff possession of the property. However, the appellate court found that the trial court erred by considering the statute of frauds *sua sponte* where the plaintiff did not raise the issue in his pleadings. *Haas*, 71 Ill. App. 3d at 328. The purpose of the requirement that the statute be specifically pled is reflected in this decision. Because the statute was not raised prior to the trial court announcing its judgment, the defendant did not have the opportunity to address the issue in its pleadings or to present any evidence that the agreement satisfied the statute.

On the other hand, courts have found that the statute of frauds was not waived where it was raised and addressed in the trial court. See, *e.g.*, *Hubble*, 291 Ill. App. 3d at 986 (finding that defendant did not waive statute of frauds defense because, although defendant did not affirmatively plead the defense in her responsive pleadings, she did fully raise the defense and argue it in her motion for summary judgment); *Greenberger, Krauss & Tenenbaum v. Katalfo*, 293 Ill. App. 3d 88, 97 (1997) (defendant did not waive the statute of frauds defense by failing to raise the defense until the "eve of trial" where section 2-616 of the Code permitted the amendment of pleadings at any time prior to judgment and where "plaintiffs were not prejudiced

by the amendment of the pleadings because the circuit court continued the trial to allow them to prepare for the new defense"); see also *Uscian v. Blacconeri*, 35 Ill. App. 3d 80, 84 (1975) (trial court did not abuse its discretion by allowing plaintiffs to file an amended pleading raising the statute of frauds and the defense was therefore not waived where plaintiffs' amended answer to defendants' counterclaim, though filed after proofs had been closed, was filed prior to the entry of judgment and both sides submitted briefs and presented oral arguments on the issue of whether the statute was applicable).

In this case, unlike in *Haas*, the trial court did not improperly consider the statute of frauds *sua sponte* by raising it for the first time when it announced its judgment. Instead, the court advised defendant prior to the presentation of its case that the statute was an issue that would be briefed at the close of trial. Defendant was therefore aware of the need to address the statute and had the opportunity to present evidence on the issue during trial. Further, plainitff alleged in his complaint that there was no written contract for the sale of the property and that Weiss did not have authority to sell the property on plaintiff's behalf. Moreover, the question of whether the statute applied was fully briefed at the conclusion of trial and prior to the entry of judgment. At that time, defendant submitted a memorandum setting forth the reasons that it believed the statute did not apply. And although plaintiff did not amend his complaint to assert the statute of frauds, he did file a memorandum arguing that the statute was applicable to the case and that it barred the alleged sale of the property to defendant. For these reasons, defendant cannot claim that he was denied the opportunity to address the statute or that he was unfairly surprised when the trial court announced its judgment and found that the alleged sale was barred by the statute. Under these circumstances, we conclude that the trial court did not improperly

consider the statute of frauds *sua sponte* and that plaintiff did not waive his right to assert the defense.

Defendant also claims that plaintiff improperly used the statute of frauds in an offensive manner in order to defeat defendant's legal title to the property. Defendant relies upon the principal that the statute is intended to be used as a shield and that it cannot be used as a sword. See, *e.g.*, *Fried v. Barad*, 175 Ill. App. 3d 382, 389-90 (1988) (noting that the statute is intended to be used as a "shield to guard against fraud and perjury" and not as a "sword with which to wound justice").

However, the record shows that defendant raised a counterclaim and affirmative defenses in response to plaintiff's complaint seeking to quiet title on his property. In its affirmative defenses, defendant claimed that it purchased the property from Weiss, who was acting as plaintiff's agent. Specifically, defendant claimed that Weiss offered to sell the property to defendant in 2000 and that in 2002 Berman accepted Weiss' offer to sell him the property for $100,000. According to defendant, Weiss showed him the letter of direction that was allegedly signed by plaintiff and defendant gave Weiss a $100,000 "counter check" payable to plaintiff for the property. Defendant also claimed that plaintiff knew of the transaction and that he ratified it because he failed to inform defendant that he had not authorized the sale. In its counterclaim, defendant asserted that it held legal title to the property since March 8, 2002, and that it recorded the trustee's deed for the property on July 12, 2002. Defendant sought rentals generated from the property that it claimed plaintiff has asserted control over since the time that he filed his lawsuit.

We find that plaintiff was entitled to raise the statute of frauds as a defense to the assertions made in defendant's counterclaim and affirmative defenses. It is a basic principle of

contract law that "[th]e purpose of the statute is not to enable contractors to repudiate contracts that they have in fact made; it is only to prevent the fraudulent enforcement of asserted contracts that were in fact not made." Corbin, Contracts, § 317-320 at 393 (1 Vol. Ed. 1952). In this case, plaintiff sought to quiet title on his property and claimed that he did not enter into a contract to sell the property to defendant. Defendant answered plaintiff's complaint by asserting that it obtained title to the property when it entered into a contract with plaintiff's agent. Defendant also sought to enforce and benefit from that asserted contract by seeking rents that it claimed plaintiff collected from the property.

Defendant made these assertions despite a number of irregularities surrounding the alleged sale of the property. For example, not only was there no written contract or authorization for Weiss to act on plaintiff's behalf, but there was also no formal closing or provisions made for clearance of title except for a previous title commitment. No inspection was held, no provisions were made for the proration of real estate taxes, and no keys were delivered to defendant. Defendant did not pay utilities or real estate taxes, did not obtain insurance on the property even though there was a tenant on the property, did not transfer the utilities to its name, and did not investigate the tenancy even though it knew of its existence. The trustee's deed was not recorded until four and one half months after the alleged purchase and only after Weiss passed away. The transaction was not consummated with certified funds and instead defendant claimed that it used a "counter check" to purchase the property. There is no record of this payment, no copy of the check, and there were insufficient funds in the Berman's bank to cover the check. Berman did not investigate why the check was never cashed. Weiss, plaintiff's alleged agent, was deceased at the time of trial and defendant claimed that it paid him $10,000 in cash for his services. There

is no record of this payment and defendant admitted that it did not ask for a receipt. Berman claimed that he used a counter check because he did not have his checkbook with him when he met Weiss. However, he was able to retrieve the $10,000 cash payment for Weiss from his home but was unable to retrieve his checkbook when he did so. Berman claimed that he participated in a number of previous transactions in which Weiss acted as agent for the sellers but claimed that Weiss preferred cash because he did not want the sellers to know that Berman was paying him. Finally, after obtaining the deed to the property, defendant contracted with a third party to sell the property for $275,000, or almost three times the price it allegedly paid.

It was in response to the assertions in defendant's counterclaim and affirmative defenses that plaintiff claimed that the alleged sale of his property was unenforceable under the statute of frauds because there was neither a written contract for the purchase nor a writing authorizing Weiss to sell the property on plaintiff's behalf. In doing so, plaintiff sought only to prevent the fraudulent enforcement of an asserted contract and he did not improperly use the statute in an offensive manner.

Having concluded that plaintiff was entitled to raise the statute of frauds, we consider whether the statute bars the alleged sale of the property. As noted, the statute requires that a contract for the sale of land be in writing, that it be signed by the party to be charged, and that it describe the property to be sold. *Hubble*, 291 Ill. App. 3d at 983. In this case, it is undisputed that there is no written contract for the alleged sale of the property to defendant. Defendant claims that Weiss' possession of a validly signed direction to convey confirmed that he was plaintiff's agent and satisfied the statute of frauds by vesting Weiss with authority to sell the property. However, there is no written contract reflecting that Weiss sold the property to

defendant as is required by the statute. The letter of direction does not satisfy the statute because it does not contain the essential terms of the sale, including the price and the manner of payment. See *Hubble*, 291 Ill. App. 3d at 983. Moreover, the statute requires that an agent who enters into a contract for the sale of real estate be authorized to do so in writing in order to render the contract enforceable. *Hubble*, 291 Ill. App. 3d at 983. Here, there is no writing satisfying this requirement. The direction to convey does not satisfy the statute because it does not mention Weiss' name or grant him authority to act as plaintiff's agent for purposes of selling the property to defendant. For these reasons, we conclude that the trial court's finding that the alleged sale of plaintiff's property to defendant could not stand under the statute of frauds was not against the manifest weight of the evidence. See, *e.g.*, *Dineff v. Wernecke*, 27 Ill. 2d 476 (1963) (brother was not bound by sale by his sister of realty belonging to them where brother did not authorize sister to act as his agent in selling or signing a contract and where brother did not sign a contract with the prospective purchasers).

Defendant nevertheless claims that the direction to convey was a sufficient writing to satisfy the statute because it manifested plaintiff's intent to sell the property. Defendant relies upon *Yorkville Nat. Bank v. Schaefer*, 71 Ill.App.3d 137, for the proposition that a writing from which a party's intent can be inferred, even though it is not itself a contract, satisfies the statute of frauds. However, *Yorkville* only recites the rule that no particular form of language is required as long as the intention of the parties can be established. This rule does not obviate the statute's requirements that the contract be in writing and that it contain the terms of the sale of the property. The direction to convey does not meet these requirements and therefore does not satisfy the statute.

Defendant also claims that the direction to convey is similar to a negotiable instrument and cites cases which it claims stand for the proposition that when a signed direction to convey is presented to a land trustee, the trustee is required to act as directed without inquiry into the direction's propriety. Regardless of whether this proposition is true, it has no relevance to this case. The issue here is not whether Chicago Title should have conveyed the property when it was presented with the letter of direction. Defendant also appears to suggest that once Weiss was in possession of the direction to convey, he was free to sell it to the defendant much like one could sell a negotiable instrument. However, defendant cites no authority for this proposition and we therefore find it waived. See 210 Ill. 2d R. 341(h)(7).

Defendant also argues that the merger doctrine, not the statute of frauds, is applicable to this case. Defendant, citing *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008), asserts that in real estate transactions, a deed supercedes the contract and all contract terms merge with the deed. However, this principle does not suggest that a deed such as the one obtained by defendant can obviate the need for a written contract as required by the statute of frauds or that a deed can essentially supply the terms that are omitted from an alleged written contract. It is the written contract that is missing in this case and the merger doctrine does not satisfy the statute's requirements.

Defendant also suggests that it performed its contractual obligations by tendering a $100,000 check to plaintiff as purchase money for the property. However, the trial court found that defendant did not prove that it actually tendered such a check to plaintiff. There was no written proof of such a check and plaintiff never negotiated the check. Additionally, payment of purchase money alone for real estate, without either possession or improvements, does not take a

case out of the statute of frauds. *Cain v. Cross*, 293 Ill. App. 3d 255 (1997).\

Defendant next contends that the trial court's decision to quiet title in plaintiff's name was against the manifest weight of the evidence. We need not consider this argument in light of our conclusion that the court's judgment to bar the alleged sale of the property under the statute of frauds was not against the manifest weight of the evidence.

For the reasons stated, the judgment of the circuit court of Cook County is affirmed.

Affirmed.