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DISCRETIONARY REVIEW GRANTED BY KENTUCKY SUPREME COURT:
MARCH 12, 2008
(FILE NO. 2007-SC-0296-DG)

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-000697-MR

BARBARA LUCINDA SAWYER

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 03-CI-01679

MELBOURNE MILLS, JR.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,¹ SENIOR JUDGE.

WINE, JUDGE: Barbara Lucinda Sawyer (“Sawyer”) appeals a well-written order from the Fayette Circuit Court granting Melbourne Mills, Jr.’s (“Mills”) motion for a judgment

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

not withstanding a verdict (“JNOV”) following a jury trial. For the reasons stated below, we affirm the JNOV.

In considering a motion for JNOV, this Court is required to review the evidence in a light most favorable to the party opposing the motion. A motion for a judgment notwithstanding the verdict shall not be granted unless there is a complete absence of proof on a material issue or if no disputed issues of fact exist upon which reasonable minds could differ. *Bierman v. Klapheke*, 967 S.W.2d 16 (Ky. 1998). On review, an appellate court must consider the evidence in the strongest light in favor of the party against whom the motion was made, and must give such party the advantage of every fair and reasonable inference that the evidence can justify. *Sutton v. Combs*, 419 S.W.2d 775 (Ky. 1967).

Sawyer was employed as a paralegal in Mills’s law firm. She brought this action to recover a bonus which she alleges that Mills promised to pay her. On February 9, 2006, a jury entered a verdict in favor of Sawyer in the amount of Nine Hundred Thousand Dollars (\$900,000.00) and the trial court entered the judgment.

At trial, Sawyer established that Mills had promised to reward her for her assistance in instituting class action lawsuits. However, the parties never specified any amount the bonus might be or when the bonus would be forwarded to Sawyer other than when “the ship comes in.” The jury found that Mills had in fact promised to pay Sawyer a bonus and that the bonus was due when the Fen-Phen class action was resolved and Mills’s firm got a substantial settlement.

After the Fen-Phen settlement, Sawyer, her husband Steve Sawyer (“Steve”), and Mills all met together on June 25, 2001. Sawyer and Steve secretly

recorded the conversation. Sawyer testified, and the tape recording confirms, that she and Steve initially asked Mills for a One Million Dollar (\$1,000,000.00) lump sum bonus, which Mills quickly rejected. But following much encouragement from Steve and Sawyer, Mills did agree to pay Sawyer a bonus of One Million Dollars (\$1,000,000.00) plus the cost of a new luxury car which all agreed would be another Sixty-Five Thousand Dollars (\$65,000.00). The full amount was to be paid in monthly installments, on the first of each month, until paid in full. The tape recording and Sawyer's testimony both confirm the parties' dollar amount and the agreed payment plan. Sawyer's Amended Answer No. 8 further alleges that the bonus was to be paid in monthly installments of Ten Thousand Dollars (\$10,000.00).

During the June 25, 2001 recorded conversation with Sawyer and Steve, Mills also agreed to sign a writing verifying the parties agreed-to terms of the bonus. During the conversation, Sawyer confirms the importance of a written agreement to protect her interest. Sawyer's attorney, Mark Moseley, drafted an agreement per the parties' request, but Mills never signed. The draft agreement provided that the bonus totaling One Million Sixty-five Thousand Dollars (\$1,065,000.00) was due and payable in monthly installments of Ten Thousand Dollars (\$10,000.00) for a period of one hundred and seven (107) months, with the last payment being Five Thousand Dollars (\$5,000.00).

Mills filed a motion for summary judgment prior to trial, arguing that Sawyer's claims were barred by the statute of frauds. In an order entered on December 1, 2005, the trial court conceded that Sawyer's claims would seem to run afoul of the statute. After reflection, the trial court denied the motion and allowed Sawyer to present

her full evidence at trial before a jury. The jury found that Mills had entered into an oral contract for the bonus, and returned a verdict in favor of Sawyer in the amount of Nine Hundred Thousand Dollars (\$900,000.00). Thereafter, Mills filed a motion for JNOV, again arguing that any agreement between him and Sawyer is barred by the statute of frauds. The trial court agreed and granted the motion.

Pursuant to the JNOV standard, we accept, as did the trial court in its order of March 30, 2006, the following facts in a light most favorable to Sawyer:

(1) That [Mills] had discussed with [Sawyer], from 1994 to June 25, 2001, that he would reward [Sawyer] for her loyalty to his law firm and for her precedent breaking idea for [Mills] to begin accepting work in “class action litigation” because of its potential for significant financial benefits;

(2) That the amount of any bonus to be paid by [Mills] to [Sawyer] was left intentionally unclear and unspecified because neither party knew if any of the “class action litigation” would prove profitable to [Mills]’s law firm or in what amounts;

(3) That any bonus to be paid by [Mills] to [Sawyer] would only be paid “when the ship comes in” which was understood to be when the “class action litigation” proved to be financially rewarding to [Mills]’s law firm;

(4) That on June 25, 2001, shortly after the class action litigation involving “Fen-Phen[,]” the diet drug[,] . . . had been settled and a substantial fee had been received by [Mills]’s firm, an agreement was reached by [Mills] and [Sawyer] as to the amount of the bonus and the terms of its payment;

(5) That in the June 25, 2001 conversation between [Mills], [Sawyer] and [Sawyer]’s husband, Steve Sawyer (hereafter “Steve”), the figure of One Million Dollars (\$1,000,000.00) was first proposed by [Sawyer] and Steve as a lump sum payment. [Mills] clearly balked at that figure as a lump sum payment.

Quickly, Steve Sawyer, with [Sawyer]'s encouragement and agreement, suggested that a total payment of One Million Dollars (\$1,000,000.00) plus the cost of a new luxury car to be paid over ten (10) years at Ten Thousand Dollars (\$10,000.00) per month until paid would be acceptable to them. This was the undisputed sworn testimony of [Sawyer], Steve, and their attorney Mark Mosely (sic) at trial. The Court, in accordance with the above JNOV standard, accepts that testimony without qualification. Further, that testimony was accepted by the jury in this case as reflected by the jury verdict when "Yes" was checked in response to Interrogatory No. 1 which specifically found that [Sawyer] and [Mills] had each understood and agreed that [Mills] would pay [Sawyer] a bonus in the amount of One Million Dollars and the value of a new car costing Sixty Five Thousand Dollars for services performed by [Sawyer] for the benefit of [Mills] per Jury Instruction No. 1;

(6) That [Mills] paid [Sawyer] the sum of Sixty-Five Thousand Dollars (\$65,000.00) in amounts ranging from Ten Thousand Dollars (\$10,000.00) to Fifteen Thousand Dollars (\$15,000.00) from June 25, 2001 until mid February 2002 plus a lump sum payment of One Hundred Thousand Dollars (\$100,000.00) in or about October 2001 in accordance with that agreement;

(7) That [Mills] broke his promise to and agreement with [Sawyer] in mid-February 2002 and thereafter by failing to make any further payments to her in accordance with his promise and their agreement;

(8) That [Mills] testified at trial and the jury found that he had the financial resources necessary to pay off the total amount promised to [Sawyer] within one year of June 25, 2001 as reflected in the jury verdict checked "Yes" to Interrogatory No. 2.

On appeal, Sawyer argues that enforcement of the agreement between her and Mills was not barred by the statute of frauds. As codified in KRS 371.010, the statute of frauds provides that no action shall be brought to charge any person "[u]pon any agreement that is not to be performed within one year from the making thereof . . .

unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.” Because he never signed the written contract, Mills contends that Sawyer cannot recover on his oral representations.

Sawyer responds that the writing requirement of the statute of frauds is satisfied through the combination of the tape recording of their conversation on June 25 and the checks Mills signed to Sawyer totaling One Hundred Sixty-five Thousand Dollars (\$165,000.00). We reject this argument. Sawyer cites *Calloway v. Calloway*, 707 S.W.2d 789 (Ky.App. 1986), where the Court held that a party could not assert the statute of frauds to escape liability on a contract in an oral statement that was recorded by a court reporter. Sawyer argues, just as the recording in *Calloway* satisfied the writing requirement, the June 25 tape recording should also be sufficient to remove Mills’s oral agreement from the statute of frauds. But in *Calloway*, the recorded agreement was made on the record, under oath, and during a deposition hearing. The statement was then transcribed by the court reporter. The Court in *Calloway* held that this was sufficient to meet the writing requirement.

In contrast, the recording in this case was not taken under oath, and there is no allegation that the written contract represents a verbatim rendition of the parties’ alleged oral agreement. We further agree with the trial court that the checks Mills wrote to Sawyer for One Hundred Sixty-five Thousand Dollars (\$165,000.00) are insufficient to meet the writing requirement. These checks merely confirm the parties’ oral agreement that Mills was to pay Sawyer Ten Thousand Dollars (\$10,000.00) on the first of the month.

Finally, Sawyer argues the writing requirement of the statute of frauds was satisfied by the Electronic Signatures in Global and National Commerce Act codified at 15 U.S.C. § 7001(a), *et seq.* We conclude that this argument is unfounded. The record is devoid of evidence that Mills ever agreed to sign off on their agreement electronically. There is no indication that attorney Moseley attempted to obtain Mills's signature for the draft agreement electronically either. 15 U.S.C § 7001(a) does not apply here and is a reaching argument put forth by Sawyer.

Sawyer next argues that the statute of frauds was not applicable because the agreement was capable of being performed within one year. As outlined above, the parties' agreement was clearly that Mills would pay Sawyer Ten Thousand Dollars (\$10,000.00) a month for a period of one hundred and seven (107) months. The tape recording of the parties' conversation on June 25 and the testimony of Sawyer, Steve and their attorney Moseley and his draft agreement all confirm these contemplations by the parties. Thus, it is safe to conclude that, pursuant to the undisputed testimony at trial from Sawyer, Steve, attorney Moseley, and the draft agreement, Mills never agreed to pay the lump sum bonus amount or make any kind of pre-payments towards the bonus. While Sawyer concedes that the parties did not contemplate performance in less than one year, she contends that the agreement did not preclude such performance either. Thus, she contends that the agreement does not violate the statute of frauds.

In support of this argument, Sawyer cites *United Parcel Service Company v. Rickert*, 996 S.W.2d 464 (Ky. 1999), and *Johnson v. Kentucky Youth Research Center Inc.*, 682 S.W.2d 799 (Ky.App. 1985). However, unlike this case, none of the parties in

Johnson or *Rickert* specifically reached an agreement that the obligations of the parties would surpass one year.

In *Johnson*, the parties agreed that the production of a documentary film would begin on a certain date and would be finished no later than fifteen months from that date. Thus, the agreement could have been completed within a year, taking the agreement outside KRS 371.010, with no contemplation from the parties that it definitely would not be completed outside of a year. And in *Rickert*, UPS promised to hire pilots working for its contract carriers if they would remain employed while UPS got their airline fully operational. At the end of the eighteen-month transitional period, UPS refused to hire Rickert claiming the statute of frauds as a defense. The Kentucky Supreme Court held that the oral agreement was not barred because the parties had not contemplated that the transitional period would extend beyond a year and so it was possible it could have been completed within twelve months.

In contrast, the trial court properly relied on *Williamson v. Stafford*, 301 Ky. 59, 190 S.W.2d 859 (1945), which is more on point with the facts of this case. In *Williamson*, the parties' dispute involved an oral contract having to do with the delivery of logs to sawmills as part of a logging operation. The parties agreed their obligations would not be performed within a year. *Id.* Just like Sawyer, the plaintiff in *Williamson* argued the oral contract could have been performed within one year so the statute of frauds did not apply. The *Williamson* Court recognized that, generally, if a contract could be performed within a year from the time it was made, the statute of frauds does not apply, even if its performance might have extended beyond that point. However, the Court also noted the well-recognized exception to that rule that, when it is contemplated

by the parties that the contract is not to be performed within the year, regardless of whether it was possible of performance within that time, the contract comes within the inhibition of KRS 371.010(7). *Id.* at 860. The Court held that since the parties did not contemplate that the contract was to be performed within a year, but several years, the statute of frauds was applicable and barred the oral agreement. Similarly, in this case Sawyer and Mills clearly anticipated that the bonus would be paid over a series of one hundred and seven (107) months from the making of the agreement on June 25, 2001. As this period is more than one year, the statute of frauds applies to bar enforcement of the agreement.

Sawyer further argues that the trial court erred in granting a JNOV setting aside the judgment based on the statute of frauds because she had fully performed her side of the agreement by the time of trial. Thus, she asserts that the lack of writing is no defense. We disagree.

In support of her argument, Sawyer cites the *RESTATEMENT (SECOND) OF CONTRACTS* § 130 (1981) and *Pilcher v. Stadler*, 276 Ky. 450, 124 S.W.2d 475, 479 (1939). These stand for the proposition that a party to an oral contract is not entitled to take advantage of the statute of frauds once the other party has fully performed her obligations under the contract. But in this case, Sawyer did not perform any obligations pursuant to the contract. Indeed, prior to June 25, 2001, there was no consideration for the agreement because Sawyer and Mills were not bound by any obligation to perform anything.

The Supreme Court makes clear that an enforceable contract must have definite and certain terms setting forth promises of performance to be rendered by each party. *Fisher v. Long*, 294 Ky. 751, 172 S.W.2d 545 (1943). The parties did not come to

an agreement as to the terms of the bonus until June 25. By this time, Sawyer had completed her performance to Mills and was no longer obliged to him. Thus, Sawyer gave no new consideration for the agreement. Sawyer further contends that she worked beyond the agreement on June 25 in anticipation of being paid. But even accepting this as true, the oral agreement still violates the statute of frauds because the parties articulated the performance to be more than one year.

In conjunction with her argument that she had already completed performance by June 25, thus removing the agreement from the statute of frauds, Sawyer contends promissory estoppel precludes Mills from relying on the statute of frauds. The trial court denied her request for jury instructions on promissory estoppel at trial finding lack of proof supporting an instruction. Sawyer does not appear to be appealing the trial court's denial of those instructions. Therefore, the issue is not one of preservation but whether there were undisputed facts showing that she was entitled to promissory estoppel as a matter of law. The elements of promissory estoppel are as follows:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

Lichtefeld-Massaró, Inc. v. R.J. Manteuffel Co., Inc., 806 S.W.2d 42, 44 (Ky.App. 1991).

Understandably, the agreement Sawyer and Mills formulated on June 25 could not have induced Sawyer to work for Mills prior to that date. Further, we agree with the trial court that Sawyer has not put forth sufficient evidence of reliance as required to establish promissory estoppel. Sawyer contends that she continued working for Mills even after they agreed to the bonus on June 25 in reliance on his promise to pay her. However, she

testified at trial that she considered her performance to Mills satisfied as of June 25, 2001, when the parties made the bonus agreement. We can hardly accept this state of mind as reliance pursuant to the elements of promissory estoppel.

Finally, Sawyer relies on *Fisher v. Long, supra*, to illustrate that a contract that is missing a term becomes enforceable when the missing term is reached by the parties. However, in *Fisher*, there was a meeting of the minds to the effect that the parties had agreed to the essential terms of their contract. Specifically, Fisher was to pay or assume the mortgage on his friend's property, and his friend would pay in cash the mortgage on Fisher's property. The Court held that even though the parties did not specify the amount of the cash payment, the amount could be easily determined by looking at the respective values of each property and the liens encumbering them. In the case *sub judice*, the bonus amount promised to Sawyer was never articulated until June 25, 2001. *Fisher* is therefore distinguishable as the facts of this case do not come down to simple math. Therefore, we reject Sawyer's argument based on *Fisher v. Long* in support of her claim against Mills.

Because it is our finding that the trial court did not err in granting the JNOV, it is not necessary for us to address the issue of prejudgment interest.

After considering the evidence in a light most favorable to Sawyer pursuant to the JNOV standard, we are persuaded that the evidence supports the finding of the trial court that the JNOV was appropriate in this case. Undisputed testimony from Sawyer, Steve and attorney Moseley and his draft agreement of the parties' June 25 conversation, coupled with the tape recording of that conversation, all confirm that the parties agreed the bonus would be paid in monthly installments over one hundred and seven (107)

months. The tape recording clearly shows that Mills never intended to pay Sawyer the bonus as a lump sum and Sawyer is recorded agreeing to the monthly payments. The parties never contemplated that the bonus would be paid within one year. Furthermore, there are no facts showing that Sawyer fully performed her obligations pursuant to the contract, or that Mills should be estopped from relying on the statute of frauds. As such, the statute of frauds bars Sawyer's claim against Mills as she produced no writing signed by Mills agreeing to the oral promise to pay her the bonus.

Accordingly, the order of the Fayette Circuit Court granting the JNOV is affirmed.

ALL CONCUR.

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