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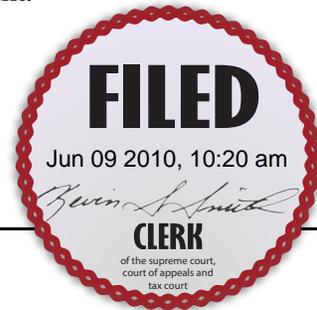
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**IN THE
COURT OF APPEALS OF INDIANA**

VICKI SUE MAZE,)

Appellant,)

vs.)

ROBERT L. DAVENPORT and COREY)
FILSON,)

Appellees.)

No. 50A03-0911-CV-531

APPEAL FROM THE MARSHALL SUPERIOR COURT
The Honorable Robert O. Bowen, Judge
Cause No. 50D01-0603-PL-3

June 9, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Vicki Sue Maze (“Maze”) appeals the trial court’s grant of summary judgment in favor of Robert L. Davenport (“Davenport”) and Corey Filson (“Filson”).

We affirm in part, reverse in part, and remand with instructions.

ISSUE

Whether the designated evidence raises a genuine issue of material fact that precludes the trial court’s proper grant of summary judgment in favor of Davenport and Filson.

FACTS¹

In 2002, years after Maze and Filson attended high school together, they became reacquainted and began dating. In February or March of 2003, Maze moved in with Filson, who had been renting a 1950s farmhouse (“Lilac Road residence”) from his uncle, Davenport, since approximately November or December of 2002. By agreement between Filson and Davenport, Filson would contribute his labor towards remodeling improvements to the residence² in lieu of paying rent. Davenport funded the construction work and often worked alongside Filson during the process.

¹ We heard oral argument in this case in Indianapolis on March 23, 2010. We commend counsel for their able presentations.

² As of November 2002, the Lilac Road residence appraised for \$105,000.00. Maze’s Ex. B.

In 2003, Davenport hired contractors to install drywall and electrical wiring, and to add an addition, thereby, increasing the size of the residence. While living in the residence rent-free, Filson and Maze assisted Davenport by providing labor for the remodeling/construction projects. It appears, but is unclear from the record, that all of the parties had independent jobs during this period, and worked on-site on weekends and when their schedules otherwise permitted. They removed a back porch from the residence, helped landscape the yard, tore down a chimney and other unwanted structures in the yard, installed windows, and gutted the interior of the upstairs level. It is undisputed that Davenport paid all of the costs associated with these construction and remodeling projects. His designated deposition testimony reveals that his expenditures therefor in 2003 totaled approximately \$48,000.00.

In the spring or summer of 2003, Maze, a licensed cosmetologist, thought it would be a good business venture for her to install a beauty salon in the basement of the residence. She paid the associated construction costs. In her deposition testimony, she testified that Davenport “thought [the Lilac Road residence] would be the perfect place to have a salon, and to spend my future at home, raising children, and being able to work there too.”³ Maze’s depo. at 27-28. On or about September 1, 2003, Davenport told

³ In his designated deposition testimony, Davenport testified that he had advised Ms. Maze . . . that I didn’t think it was a good idea for her to locate her [beauty] shop in the home, that since the nature of the relationship might have not worked out . . . that, you know, she would be invested in something that I certainly didn’t want and that she would be unhappy with.
Davenport’s depo. at 27.

Filson and Maze that he wanted them to start paying rent due to the improvements that he had made to the residence. Thereafter, Maze and Filson made monthly rent payments in the amount of \$350.00. They also continued to provide labor for the ongoing remodeling projects, and purchased⁴ kitchen appliances worth approximately \$5,000.00. Maze's beauty salon opened for business in February 2004.

It is undisputed that on a number of occasions in 2003 and 2004, Maze, Filson, and Davenport discussed the possibility of Maze and Filson purchasing the Lilac Road residence from Davenport at some time in the future to serve as their marital residence. However, in those conversations, the parties never discussed relevant details such as: purchase price; interest rate; mortgage; lease to buy; contract; terms and conditions of payment; years to amortize, etc.

In April 2004, Maze, Filson, and Davenport met to discuss the Lilac Road residence. The parties dispute the nature of the discussion. Maze asserts that Davenport promised to sell the residence to her and Filson; promised to "be the bank" in the transaction; showed them an amortization schedule indicating the appropriate monthly payment that corresponded with a house valued at \$120,000.00; and agreed to accept monthly payments in the amount of \$700.00 towards their purchase of the residence. Maze depo. at 21. Thereafter, Maze assumed that their monthly \$700.00 payment constituted an agreement between her, Filson, and Davenport for the purchase of the property. *See* Maze depo. at 77.

⁴ Due to Filson's inability to obtain credit, Maze charged the cost of the appliances to a credit card held in her name.

In their respective depositions, Filson and Davenport denied that the April 2004 discussion pertained to Davenport's sale of the residence to Maze and Filson. Both acknowledged that there had been discussions concerning the possibility of a sale in the future, but denied that the discussion involved purchasing the property at that time. Rather, they testified that during the April 2004 discussion, Davenport addressed the extent to which the ongoing costs associated with maintaining the residence had increased, and presented an amortization schedule merely to illustrate the fact that Maze and Filson's existing monthly rent of \$350.00 did not cover the expenses of maintaining a house valued at \$120,000.00. There was no evidence of any written memorandum memorializing the specifics of the parties' discussion.

It is undisputed that following the April of 2004 discussion, Maze and Filson increased their monthly payment to \$700.00 per month. Maze testified that said increase constituted a house payment, as indicated on her checks. On the other hand, Davenport and Filson testified that the increased monthly payment reflected a more reasonable rent payment, given the increased size, maintenance costs, and value of the property.

In September 2004, Maze moved out of the residence, after an alleged incident of domestic battery by Filson. When she left, she removed most of the beauty salon furnishings – track lighting, mirrors, shampoo sink, furniture, and cabinets – leaving behind the bathroom sink and commode, can lights, doors, ceramic tile flooring, and other such fixtures as she could not easily remove from the residence. Davenport's

expenditures on the residence in 2004 totaled approximately \$29,000.00. As of November 9, 2004, the residence appraised for \$185,000.00. Maze's Ex. C.

On March 4, 2006, Maze filed a two-count complaint against Davenport and Filson, wherein she alleged that (1) Davenport had breached a contract for the sale of the Lilac Road residence to her and Filson; and that (2) Davenport and Filson would be unjustly enriched if they were permitted to retain the benefit of her improvements to the residence. On April 5, 2006, and June 29, 2006, respectively, Davenport and Filson filed their answers, wherein they denied the existence of a contract for sale of the residence, and asserted the Statute of Frauds as an affirmative defense.

On May 1, 2009, Davenport and Filson filed a motion for summary judgment and memorandum of law.⁵ They also filed a Designation of Evidentiary Materials which provided, in its entirety, as follows:

Defendants Robert L. Davenport and Corey Filson, by counsel, designate the following materials upon which they rely in support of their motion for summary judgment:

1. Plaintiff's Complaint.
2. Defendants' Answers to Complaint, including Counterclaims and Affirmative Defenses.
3. Deposition of Plaintiff, Vicki Sue Maze (Now Dosmann).
4. Deposition of Defendant, Robert L. Davenport.
5. Deposition of Defendant, Corey Filson.
6. Indiana Code 32-21-1-1.
7. Memorandum of Law of Defendants.

⁵ The record does not include Davenport and Filson's memorandum of law.

(Davenport-Filson App. 8). On July 15, 2009, Maze filed her response to Davenport and Filson's motion for summary judgment. She also designated material facts within her accompanying memorandum of law.⁶

On July 22, 2009, the trial court conducted a hearing on Davenport and Filson's motion for summary judgment, which was granted by order of August 11, 2009. The trial court's order provided, that "No writings exist which set forth the terms of any contract between the parties"; and Maze's "claims are barred by the statute of frauds." (Maze's App. 31). On September 3, 2009, Maze filed a motion to correct error, which was denied after a hearing, on September 30, 2009. Maze now appeals.

Additional facts will be provided as necessary.

⁶ We encourage counsel for both parties to familiarize themselves with the rules regarding designating evidence in summary judgment proceedings. Our review of a trial court's ruling on summary judgment is limited to the evidence designated by the parties to the trial court; thus, it is incumbent upon the parties to designate all materials which they reference in support of their motion or reply for summary judgment.

Here, only Davenport and Filson submitted a separate designation; however, they designated their respective depositions in their entirety. Maze never submitted a separate designation, but instead, designated facts within the text of her memorandum in response to Davenport and Filson's motion for summary judgment, requiring the trial court to search the record in order to construct her claim(s).

Indiana courts have held that, since the 1991 amendments to Indiana Trial Rule 56, a party must designate the specific portions of the record upon which it relies in order to prevail: "No longer can parties rely without specificity on the entire assembled record--depositions, answers to interrogatories, and admissions-- to fend off or support motions for summary judgment. It is not within a trial court's duties to search the record to construct a claim or defense for a party."

Rosi v. Business Furniture Corp., 615 N.E.2d 431, 434 (Ind. 1993).

DECISION

Maze argues that the trial court erred in concluding that her claims are barred by the Statute of Frauds. Specifically, she argues that she designated sufficient evidence to establish the elements of the equitable doctrines of part performance and promissory estoppel which would remove her claims from application of the Statute of Frauds. She also argues that the trial court erred in failing to address her unjust enrichment claim.

1. Standard of Review

Our standard of review for summary judgment appeals is well established. An appellate court faces the same issues that were before the trial court and follows the same process. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having its day in court.

Summary judgment is appropriate only if the pleadings and evidence sanctioned by the trial court show that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper.

Knoebel v. Clark County Superior Court No. 1, 901 N.E.2d 529, 531 (Ind. Ct. App. 2009)

(internal citations omitted); Ind. Trial Rule 56(C) (emphasis added).

2. Statute of Frauds and Applicable Exceptions

It is the general rule that the enforceability of contracts for the sale of real estate depends upon their being in written form. The reason for the statute of frauds is quite simply to preclude fraudulent claims which would

probably arise when one person's word is pitted against another's and which would open wide those ubiquitous "flood-gates of litigation."

Summerlot v. Summerlot, 408 N.E.2d 820, 828 (Ind. Ct. App. 1980) (internal citation omitted). To that end, the Statute of Frauds provides that a person may not bring an action involving a contract for the sale of land "unless the promise, contract, or agreement on which the action is based . . . is in writing and signed by the party against whom the action is brought or by the party's authorized agent." I.C. § 32-21-1-1.

a. *Part Performance*

Maze argues that the trial court erred by "implicitly holding" that the doctrine of part performance did not apply, because she designated sufficient evidence to establish the elements thereof and, thereby, to remove the oral contract from the application of the Statute of Frauds. Maze's Br. at 14. We disagree.

As discussed above, the Statute of Frauds requires contracts for the sale of real property to be in writing. I.C. § 32-21-1-1(b)(4). Oral contracts for the sale of land are voidable, not void; and such contracts may be excepted from the Statute of Frauds where there is part performance. *Fox Dev., Inc. v. England*, 837 N.E.2d 161, 166 (Ind. Ct. App. 2005). "The part performance doctrine is based on the rationale that equity will not permit a party who breaches an oral contract to invoke the statute of frauds where the other party 'has performed his part of the agreement to such an extent that repudiation of the contract would lead to an unjust or fraudulent result.'" *Spring Hill Developers v. Arthur*, 879 N.E.2d 1095, 1104 (Ind. Ct. App. 2008) (internal citation omitted). "[W]here

the oral promise is to sell an interest in land, ‘some combination’⁷ of the following acts of performance are sufficient for the doctrine to apply: 1) payment of the purchase price or a part thereof; 2) possession; and 3) lasting and valuable improvements on the land.” *Id.* “[T]he facts which may be held to constitute part performance will vary with each individual case.” *Summerlot*, 408 N.E.2d at 829.

Here, we cannot reach the specific elements of the part performance doctrine because Maze cannot establish the existence of an oral contract. First, the designated materials support the conclusion that no oral contract existed for the sale of the Lilac Road residence. In her designated deposition testimony, Maze testified that in April of 2004, Davenport agreed to sell the residence to herself and Filson. She asserted that on that occasion, Davenport presented Filson and herself with an amortization schedule; promised to sell the Lilac Road residence to them for a purchase price of \$120,000.00; stated that he would “be the bank” in the transaction; and agreed to accept monthly payments of \$700.00. Maze depo. at 23.

On the other hand, Davenport and Filson each testified that they had casually discussed the possibility of such a transaction in the future, but did not contemplate sale of the Lilac Road residence at the time of the April 2004 discussion. In support of her contention that an oral contract existed, Maze testified that Davenport had presented her

⁷ “However, Indiana courts, holding fast to the validity of the rationale behind the statute of frauds, have through the years rather strictly adhered to requiring proof of a combination of three specific elements: payment, possession, and improvements.” *Summerlot*, 408 N.E.2d at 829.

and Filson with an amortization schedule; promised to sell the Lilac Road residence to them; stated that he would “be the bank” in the transaction; and agreed to accept monthly house payments of \$700.00. Maze depo. at 23. She apparently inferred a purchase price of \$120,000.00 from the amortization schedule, but could not produce that document or state such relevant contract terms as the applicable interest rate, the term of the loan, or the terms of repayment.

Based upon the foregoing, we conclude that no oral contract existed because there was clearly no meeting of the minds as required under basic principles of contract law. *See Olsson v. Moore*, 590 N.E.2d 160, 162 (Ind. Ct. App. 1992) (“If the parties’ expressions fail to show agreement on essential terms of the purported agreement, there is no mutual assent and hence no contract.”).

Next, Maze cannot demonstrate that her improvements were prompted by Davenport’s April 2004 promise to sell the Lilac Road residence. Although she designated her deposition testimony that “all year long in [20]03 and [20]04” Davenport had made casual references to herself and Filson purchasing the Lilac Road residence from him in the future, she specifically identified only her April 2004 discussion with Filson and Davenport as the date on which the parties entered into the oral agreement to purchase the property. Maze depo. at 22, 23, (Aff. of Maze, Ex. 7).

The designated materials reveal that the most significant improvements to the residence were undertaken well before April of 2004 as follows:

In '03, we worked on the landscaping. We tore out a chimney. We tore down structures in the yard. Pulled off the back of the back porch off of the house. We put new windows in all – the whole house. We gutted the upstairs, started rebuilding. There were many projects going on.

Maze depo. at 20 (emphasis added). Not only did Davenport fund these improvements, but also, the improvements predated his alleged April 2004 promise to sell. Maze also testified that **between the spring or summer of 2003 and February of 2004**, she paid the costs⁸ associated with installing her beauty salon in the basement of the residence. The record further reveals that when asked whether she had paid for improvements to the residence in 2004, Maze tendered cancelled checks purporting to represent her “out-of-pocket[]” expenditures for the Lilac Road residence. Maze depo. at 26. Counsel for Davenport reviewed them and asked, “[I]t appears that there are many charges of payments for the **January-February [2004]** period; is that correct?”; Maze responded, “Yes.” Maze’s depo. at 25. Counsel’s tendered materials also included three cancelled checks dated between April 3, 2004, and April 12, 2004, reflecting Maze’s payments to Lowe’s, Home Depot, and Sam’s Club totaling approximately \$210.00. Maze’s Ex. A. We conclude that Maze cannot reasonably demonstrate that her improvements were made or prompted by Davenport’s alleged promise and that she undertook the improvements in order to perform her obligations of performance.

⁸ Specifically, she testified that she purchased lumber, insulation, doors, casings, drywall, hardware, ceramic tile, cabinetry, and bathroom fixtures for her beauty salon; she also “cut hair for Filson’s family in exchange for their installing the lift station, sump pump, toilet, sink, and faucet” in the salon. (App. 18-19). She also testified that her family painted and did the electrical wiring work for her beauty salon. She testified further that her father had purchased and installed the bathroom exhaust fan and light, and also installed can lights and track, bathroom light fixtures, and insulation in the beauty salon.

Because Maze can neither establish the existence of an oral contract nor demonstrate that said improvements constituted partial performance of the oral agreement, we conclude that the part performance doctrine does not apply to remove Davenport's alleged promise from the application of the Statute of Frauds.

b. *Promissory Estoppel*

Maze argues that the trial court erred in granting summary judgment against her because her designated evidence established the elements of promissory estoppel sufficient to remove her alleged oral contract with Davenport and Filson from the application of the Statute of Frauds. We disagree.

“The estoppel doctrine is based on the rationale that a person whose conduct has induced another to act in a certain manner should not be permitted to adopt a position inconsistent with such conduct so as to cause injury to the other.” *Spring Hill Developers*, 879 N.E.2d at 1100 (citing 31 C.J.S. Estoppel and Waiver § 2 (1996)). In order to establish promissory estoppel and remove an oral promise to convey real estate from the operation of the Statute of Frauds, a plaintiff must prove the following five elements: (1) a promise by the promisor; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promisee. *Id.* The plaintiff must also demonstrate “that the other party’s refusal to carry out the terms of the agreement has resulted not merely in a denial of the rights

which the agreement was intended to confer, but the infliction of an unjust and unconscionable injury and loss.” *Brown v. Branch*, 758 N.E.2d 48, 51 (Ind. 2001).

For the same reasons discussed above with respect to the doctrine of part performance, we find that because (1) Maze cannot establish the existence of an oral contract, and (2) because her most significant improvements predated Davenport’s alleged promise to sell, she cannot establish that her improvements were induced by and made in reasonable reliance upon his promise to sell. She, therefore, cannot meet her burden of proof; accordingly, we conclude that the doctrine of promissory estoppel does not apply to remove Davenport’s promise from the application of the Statute of Frauds.

c. Unjust enrichment

Maze argues that the trial court erred in failing to address her claim for damages for unjust enrichment because she designated sufficient evidence to demonstrate the existence of genuine issues of material fact. Specifically, she argues that she is entitled to restitution because she spent nearly \$20,000.00 on permanent repairs and improvements to the Lilac Road residence, and that Davenport and Filson will be unjustly enriched if they are permitted to retain said benefit.

Unjust enrichment comes within the purview of an action based on quasi contract or quantum meruit. A party seeking to recover upon such a theory must demonstrate that a benefit was rendered to the other party at the express or implied request of such other party.

Dedelow v. Rudd Equipment Corp., 469 N.E.2d 1206, 1209 (Ind. Ct. App. 1984).

Maze's designated materials reveal that when she proposed the installation of the beauty salon, Davenport was amenable to the idea. The designated evidence further reveals that Maze paid all of the costs associated with constructing and furnishing the beauty salon. Specifically, she purchased drywall, can and track lighting, bathroom fixtures, flooring supplies, mirrors, cabinets and cupboards, and other building materials and hardware for the construction of her beauty salon. She also paid for the installation of a limestone parking lot for customer parking. She testified further that when she was forced from the residence in November of 2004, she removed the "salon furnishings, the track lighting, the mirrors, . . . shampoo sink, [] couch, [] chairs, cabinets, except . . . the bathroom cabinet," can lighting, tile flooring, paint on the walls, and the bathroom sink [and commode]." Maze depo. at 30 (emphasis added).

The designated materials thus indicate that Maze was responsible for the addition of the following permanent fixtures, which remained in the Lilac Road residence, after she moved out: the wall framing and drywall (finished walls); a basement bathroom containing a sink, commode, and cabinet; ceramic tile flooring; and can lighting.

In addition, Maze argues that she is entitled to restitution for approximately \$5,000.00 of kitchen appliances that she purchased for the Lilac Road residence on her credit when Filson lacked the means to do so. During Filson's deposition, he testified that because of his poor credit, he did not have a credit card when he and Maze lived together; and that Maze had given him a credit card in her name. He testified further that approximately \$5,000.00 of kitchen appliances had been purchased on said credit card,

and that although he and Maze had an agreement whereby the appliances debt was to be paid off, he had not made any payments on the appliances “since a few months after we broke up,” because Maze had not provided him with the associated credit card statements. Filson’s depo. at 43. It is undisputed that the kitchen appliances remain at the Lilac Road residence, where Filson continues to reside. It is also undisputed that Maze has since paid the debt.

Based upon the foregoing, we find that Maze designated sufficient evidence to establish that a genuine issue of material fact exists as to whether Filson and/or Davenport were unjustly enriched and retained a benefit from her installation of several permanent fixtures and approximately \$5,000.00 in kitchen appliances in the Lilac Road residence. *See Dedelow*, 469 N.E.2d at 1209. Thus, we conclude that the trial court erred in failing to address Maze’s claim for restitution on grounds of unjust enrichment and that its grant of summary judgment in favor of Davenport and Filson was improper.

3. Conclusion

In light of Maze’s inability to remove Davenport’s alleged oral promise to contract for the sale of real estate from the Statute of Frauds through the doctrines of part performance and promissory estoppel, we affirm the trial court’s grant of summary judgment with respect to her claim for damages for breach of contract. However, as to her unjust enrichment claim, we remand to the trial court with instructions to conduct a hearing in accordance with our opinion herein.

Affirmed in part and remanded for hearing.

KIRSCH, J., and MAY, J., concur.