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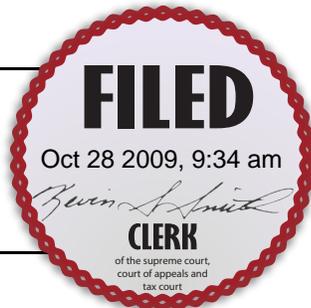
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**IN THE
COURT OF APPEALS OF INDIANA**



IN RE THE MARRIAGE OF)
)
THOMAS L. FINE,)
)
Appellant-Petitioner,)
)
AND)
)
KAREN D. FINE,)
)
Appellee-Respondent,)
)
ROBERT G. HARP AND)
DELORES C. HARP,)
)
Third Party Respondents.)

No. 82A05-0904-CV-178

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Robert J. Pigman, Judge
Cause No. 82D04-0309-DR-917

October 28, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Thomas Fine appeals the trial court's order concluding Robert and Dolores Harp are the owners of the real estate located on Royal Avenue in Evansville, Indiana (the "Residence"), and Thomas and his wife, Karen, rented the Residence on a month-to-month basis. For our review, Thomas raises a single issue, which we restate as whether the trial court erred when it concluded no enforceable contract for the sale of the Residence existed. Concluding the evidence supports the trial court's findings of fact and the findings support its conclusions of law, we affirm.

Facts and Procedural History

Thomas and Karen were married on August 31, 1971. In 1978, Thomas and Karen moved into the Residence, which was owned by the Harps. Thomas claims the parties entered into a land sale contract, whereby he and Karen would purchase the Residence from the Harps for \$72,000. Thomas claims the terms of agreement called for a down payment of \$12,000 followed by monthly payments of \$300 to pay off the \$60,000 balance at an interest rate of nine percent. Thomas also claims the parties executed four copies of a written agreement, but he was unable to produce any copies of the agreement to the trial court. Thomas did not record a copy of the agreement with the county recorder's office. The most

recently recorded deed for the Residence is the deed to the Harps when they purchased the property in 1964.

For their part, the Harps claim the parties entered into an oral month-to-month lease of the Residence with a monthly rental payment of \$300 and deny the existence of a written land sale contract.¹ The Harps, who own and manage several rental properties, produced copies of receipts made out to Karen for rental payments and copies of ledger books detailing payments for their rental properties, including entries for the Residence. The Harps also produced evidence they paid the property taxes for the Residence each year Thomas and Karen lived there. The Harps submitted a letter from their accountant, who also testified at the trial, indicating they claimed the payments made by Thomas and Karen as rental income on their tax returns.

Thomas and Karen took out homeowner's insurance policies on the Residence listing the Harps as the first mortgagees. The Harps also took out insurance policies on the Residence. In 1989, the Residence was destroyed by fire. The insurance company made checks out to Thomas and Karen alone and to Thomas and Karen jointly with the Harps. A witness from the insurance company testified that payments made to Thomas and Karen alone were for damage to their personal property, whereas payments made to both parties jointly were for damage to the real property. The Residence was rebuilt using the insurance proceeds. The Harps contracted and made payments for the reconstruction of the Residence. However, Thomas and Karen requested that some additions be made to the Residence during

¹ However, a letter sent to Thomas by the Harps' attorney states he was required to pay rent in the amount of \$537.30 per month plus pay one-half of the property taxes each year.

reconstruction including enlarging the square footage of the Residence and the attached garage and constructing a patio wall. Thomas and Karen paid for the extra cost of these additions.

In 2003, Thomas filed for divorce from Karen. During the course of the divorce litigation, Thomas filed a third-party complaint against the Harps to enforce the land sale contract. The trial court held a bench trial on the third-party complaint on August 3rd and 4th and September 28, 2006. On February 1, 2007, the trial court entered its findings of fact and conclusions of law determining no enforceable land sale contract existed and the home was owned by the Harps. Thomas attempted to appeal the trial court's order; however, this court dismissed the appeal, concluding no appealable judgment existed. Thereafter, the trial court entered final judgment on its findings of fact and conclusions of law on February 24, 2009. Thomas now appeals.

Discussion and Decision

I. Standard of Review

Where, as here, the trial court enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, we employ a two-step review.

[W]e must first determine whether the evidence supports the findings and second, whether the findings support the judgment. The trial court's findings and conclusions will be set aside only if they are clearly erroneous, that is, if the record contains no facts or inferences supporting them. A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. We neither reweigh the evidence [n]or assess the credibility of witnesses, but consider only the evidence most favorable to the judgment.

Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007) (citations omitted). In addition, we review questions of law de novo. Bowyer v. Ind. Dep't of Natural Res., 882 N.E.2d 754, 761 (Ind. Ct. App. 2008).

II. Enforceability of the Land Sale Contract

The Statute of Frauds states in relevant part:

A person may not bring any of the following actions unless the promise, contract, or agreement on which the action is based, or a memorandum or note describing 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:

...

(4) An action involving any contract for the sale of land.

Ind. Code § 32-21-1-1(b). The Statute of Frauds does not govern the formation of contracts to sell land, only their enforceability. Therefore, lack of compliance with the Statute of Frauds does not make an oral contract to sell land void; rather it renders the contract voidable. Dupont Feedmill Corp. v. Standard Supply Corp., 182 Ind. App. 459, 462, 395 N.E.2d 808, 810 (1979). Thomas and the Harps disagree about whether a written contract for the sale of the Residence ever existed; however, Thomas was unable to produce any written document signed by the Harps describing the alleged agreement. Nonetheless, the alleged agreement may still be enforceable, despite non-compliance with the Statute of Frauds, if there is an equitable exception such as promissory estoppel or part performance. See Spring Hill Developers, Inc. v. Arthur, 879 N.E.2d 1095, 1100-1105 (Ind. Ct. App. 2008) (providing a detailed analysis of both equitable exceptions).

A. Promissory Estoppel

Thomas argues the Statute of Frauds should not apply because of the equitable doctrine of promissory estoppel.

The doctrine of estoppel to assert the statute of frauds against a claim based upon an oral contract is founded upon the vital principle that he who by his language or conduct leads another to do, upon the faith of an oral agreement, what he would not otherwise have done, and changes his position to his prejudice, will not be allowed to subject such a person to loss or injury, or to avail himself of that change to the prejudice of such other party.

Dupont, 182 Ind. App. at 463, 395 N.E.2d at 811 (citations and quotation omitted). A party seeking to defeat the Statute of Frauds by asserting promissory estoppel must establish the following elements:

1) a promise by the promisor; 2) made with the expectation that the promise 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 promise.

Spring Hill, 879 N.E.2d at 1100 (citing First Nat'l Bank of Logansport v. Logan Mfg. Co., 577 N.E.2d 949, 954 (Ind. 1991)).

The only evidence Thomas points to as actions taken in reasonable reliance on the existence of a contract to purchase the Residence is that he bought homeowner's insurance policies for the Residence from 1978 until 2003. Our supreme court has held "[i]f what the party gave up in reliance on an oral promise was no greater than what the party would have given up in any event, then the consideration is deemed insufficient to remove the oral promise from the operation of the Statute of Frauds." Brown v. Branch, 758 N.E.2d 48, 53 (Ind. 2001). Several witnesses, including the insurance agent who issued the policies,

testified that the insurance policies insured Thomas and Karen for their personal property and the Harps for the real property. The agent testified it was cheaper to issue a single homeowner policy listing Thomas and Karen as the homeowners and the Harps as the lien holder rather than issuing separate landlord and renter's insurance policies. It is reasonable to infer Thomas and Karen would have insured their personal property through renter's insurance even if they had not relied upon the alleged oral promise of the Harps to sell them the Residence. Therefore, the purchase of the insurance is not sufficient consideration to establish promissory estoppel.

B. Part Performance

Although Thomas describes his argument as one asserting the equitable doctrine of promissory estoppel, his argument also discusses facts that would support an assertion of the equitable doctrine of part performance as an exception to the Statute of Frauds. The part performance doctrine "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, 879 N.E.2d at 1104 (quotation omitted). In the context of an oral contract to sell land, some combination of the following acts of performance are sufficient for the doctrine of part performance to apply: "1) payment of the purchase price or a part thereof; 2) possession; and 3) lasting and valuable improvements on the land." Id.

There is no dispute that Thomas and Karen lived in the Residence from 1978 until 2003 and paid \$300 per month to the Harps. However, whereas Thomas claims the payments

were being made toward the purchase of the Residence, the Harps and Karen claim the payments were for rent. Thomas testified the parties agreed he and Karen would buy the Residence by paying \$12,000 down and monthly payments of \$300 at nine percent interest. The Harps presented evidence from an expert witness that a loan under these terms could never be paid off as the interest accumulated each year would exceed the \$3,600 annual payments causing the total amount owed to increase over time rather than decrease. For example, in the first year the loan would accumulate \$5,400 in interest expenses; however, Thomas and Karen would have only paid \$3,600, resulting in an addition of \$1,800 to the balance of the loan. It stretches the notion of credibility to accept the existence of an agreement that is impossible to fulfill.

As evidence that he and Karen owned the Residence, Thomas submitted annual financial statements completed by him and Karen from 1994 until 2003 (one statement is undated and another has an illegible date) that indicate their ownership of the Residence. However, on each of the financial statements, the amount owed to the Harps is listed as \$60,000. In other words, according to the financial statements, despite payments of \$300 per month over a period of ten years, the principal balance of the purchase price of the residence never changed. Karen testified regarding the financial statements the \$60,000 figure “was just the number Tom made up.” Transcript at 514.

Considering only their possession of the Residence and the \$300 monthly payments, nothing weighs particularly in favor of either a rental or purchase agreement. However, Thomas also alleges he and Karen made a down payment of \$12,000 on the property. If this

were true, it would weigh in favor of the existence of a purchase agreement. However, the evidence of the existence of such a payment is contradictory. Thomas testified that he made the payment, while Robert Harp and Karen testified no down payment was made. It is the role of the fact-finder and not this court to weigh the evidence and judge witness credibility. See Webb, 868 N.E.2d at 592. Rather, we must consider only the evidence favorable to the trial court's judgment, id., which is that no down payment was made. As a result, we find no evidence of part performance of a purchase agreement other than what would be consistent with a rental agreement.

Conclusion

The evidence supports the trial court's findings of fact that no written contract satisfying the Statute of Frauds for the sale of the Residence existed. In addition, there is no conclusive evidence to establish the equitable exceptions of promissory estoppel or part performance. Therefore, the trial court's findings support its conclusions of law that Thomas has no ownership interest in the Residence. As a result, the judgment of the trial court is affirmed.

Affirmed.

DARDEN J., and MATHIAS, J., concur.