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**IN THE
COURT OF APPEALS OF INDIANA**

PENNY E. PITCOCK,)
)
Appellant-Plaintiff,)
)
vs.) No. 49A02-0702-CV-191
)
ROTH ASSOCIATES, INC. and)
MARY ROTH,)
)
Appellees-Defendants.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Cynthia Ayers, Judge
Cause No. 49D04-0503-CC-9713

September 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Penny E. Pitcock (“Penny”) appeals the trial court’s grant of a Motion to Correct Errors and a Motion for Relief from Judgment filed by Roth Associates, Inc. (“Roth Inc.”) and Mary Roth (“Mary”) (collectively “Roth”). We affirm.

Issue

Penny raises five issues on appeal. Concluding one of them to be dispositive, we consolidate and re-state the issue as: whether the trial court abused its discretion in granting Roth’s Motion to Correct Errors.

Facts and Procedural History

Penny and Mary are both social workers. Mary is the sole owner and officer of Roth Inc., incorporated in February of 2002. Roth Inc. entered into a contract with the Indiana Family and Social Services Administration (“State”) to be performed from October of 2004 through June of 2007. From approximately October of 2004 through early March of 2005, a dispute arose regarding the payment of Penny, Mary’s desire that Penny sign an independent contractor agreement, and the retention of files.

Penny filed a Complaint on March 14, 2005, alleging that she and Mary had a partnership agreement, that Mary had breached that agreement, that Mary and Roth Inc. had breached fiduciary duties owed to Penny, and that Roth owed Penny an accounting, damages, and punitive damages. However, Penny did not allege that their partnership agreement was in writing. On May 2, 2005, Roth filed an Answer, asserting the Statute of Frauds as an

affirmative defense.¹

On July 6, 2005, Penny served Roth with nine interrogatories. On September 21, 2005, attorney Ralph W. Staples, Jr. (“Staples”) served Roth’s responses. On October 27, 2005, Penny moved to compel discovery, arguing that Roth’s responses to two of the interrogatories were inadequate. Those questions concerned the alleged partnership agreement and the method Roth used to calculate payments to Penny. Four days later, the trial court gave Roth fourteen days to respond “fully and fairly” to the interrogatories. Appendix at 57. On December 6, 2005, Penny filed her Second Motion to Compel Discovery Responses, seeking alternatively, pursuant to Indiana Trial Rule 37(B)(2)(b), that Roth either respond within three days or be prohibited from presenting evidence regarding the subject of the two interrogatories. On February 14, 2006, the trial court gave Roth ten days to respond or Roth’s evidence would be barred. Roth did not respond.

Six months later, Penny moved for partial summary judgment and designated in support several affidavits, including her own.² In her affidavit, Penny stated that “I never entered into a written agreement with Roth or Roth’s Corp.” *Id.* at 120. Roth did not respond to her motion. On October 12, 2006, the trial court granted Penny’s motion, finding that Penny and Mary were partners, that Mary breached the partnership agreement, and that Mary and Roth Inc. breached their fiduciary duties to Penny.³ It ordered, among other things,

¹ Roth filed an Amended Answer, deleting the words “and counterclaim” from the heading of the Answer. Appendix at 2. The record contains neither the Answer nor the Amended Answer.

² In her Motion for Partial Summary Judgment, Penny did not argue that she was entitled to summary judgment as to Roth Inc.’s alleged breach of fiduciary duties. However, she asserted that Roth and Roth Inc. were “jointly and severally indebted” to her for all of the relief she sought in her Complaint. App. at 62.

³ The trial court so concluded, despite Penny’s omission to argue in her Motion for Partial Summary

Roth to pay Penny \$171,312.40.

One month after the entry of Partial Summary Judgment, a different attorney filed Roth's Motion to Correct Errors. The trial court granted Roth's motion and vacated its Partial Summary Judgment, concluding that the Statute of Frauds prevented the enforcement of an oral partnership agreement to be executed over a term longer than one year.

Penny now appeals.

Discussion and Decision

I. Standard of Review

Indiana Trial Rule 59(J) provides as follows:

The court, if it determines that prejudicial or harmful error has been committed, shall take such action as will cure the error, including without limitation the following with respect to all or some of the parties and all or some of the errors:

...

Alter, amend, modify or correct judgment.

Ind. Trial Rule 59(J). We review for an abuse of discretion trial court rulings on motions to correct error. Paragon Family Rest. v. Bartolini, 799 N.E.2d 1048, 1055 (Ind. 2003). An abuse of discretion will be found when the trial court's action is against the logic and effect of the facts and circumstances before it and the inferences which may be drawn therefrom. Pritchett v. Heil, 756 N.E.2d 561, 564 (Ind. Ct. App. 2001).

A party is entitled to summary judgment only if the designated evidence shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a

Judgment that she was entitled to judgment as a matter of law as to Roth Inc.'s breach of its fiduciary duties. See supra note 2.

matter of law. Ind. Trial Rule 56(C). “All facts and reasonable inferences drawn from those facts are construed in favor of the non-moving party.” Gunkel v. Renovations, Inc., 822 N.E.2d 150, 152 (Ind. 2005), reh’g denied. Our review is limited to the materials designated to the trial court. Ind. Trial Rule 56(H); Gunkel, 822 N.E.2d at 152.

II. Analysis

On appeal, Penny emphasizes that Roth submitted neither argument nor designated materials to oppose her Motion for Partial Summary Judgment. The basis of Penny’s lawsuit was that Roth had breached a partnership agreement intended to support a thirty-three-month contract with the State.⁴ The Statute of Frauds prevents the enforcement of an oral contract to be performed more than one year from the making of the contract. Ind. Code § 32-21-1-1(b)(5).

Significantly, Penny acknowledged in her affidavit that she had never entered into a written agreement with Roth. She made this comment after describing communications between herself and Mary regarding her compensation and the nature of their “arrangement.” App. at 120. Penny apparently intended the statement to deny that they had ever formalized their relationship. In doing so, however, Penny essentially admitted that the alleged partnership agreement was not in writing. The trial court found that “Plaintiff admit[ted] that there was no written partnership agreement.” Id. at 13. Accordingly, by virtue of Penny’s own affidavit, the Statute of Frauds precluded the entry of summary judgment in her favor.

⁴ Penny asserted in her Motion for Partial Summary Judgment that she and Mary were “partners with regard to all matters pertaining to” the contract with the State. App. at 62.

Conclusion

The trial court did not abuse its discretion in granting Roth's Motion to Correct Errors and vacating its earlier entry of Partial Summary Judgment.⁵

Affirmed.

BAKER, C.J., and VAIDIK, J., concur.

⁵ Having so concluded, we need not reach whether the trial court erred in granting Roth's Motion for Relief from Judgment.