

No. 1-15-1980

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SCHILLER APARTMENTS, LLC,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 13 CH 12476
)	
NATIONSTAR MORTGAGE, LLC,)	Honorable
)	Franklin Ulysses Valderrama,
Defendant-Appellee.)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Statute of frauds bars specific performance of an alleged oral agreement to convey real property where plaintiff's asserted full performance was not in reasonable reliance of a contract.

¶ 2 Plaintiff-appellant Schiller Apartments, LLC appeals the trial court's dismissal of its second amended complaint seeking specific performance of an alleged oral agreement to purchase real property from defendant-appellee Nationstar Mortgage, LLC. Schiller contends that its full performance of the alleged oral agreement renders the agreement enforceable and

outside the statute of frauds. Because we find the statute of frauds bars enforcement of the alleged oral agreement, we affirm dismissal of Schiller's second amended complaint.

¶ 3 This case involves an alleged oral agreement to purchase property located at 161 West Schiller Street in Chicago. Nationstar was the highest bidder for the property at a judicial sale on August 14, 2012.¹ A year later on August 15, 2013, Schiller offered to purchase the certificate of sale from Nationstar for \$935,000. Schiller asserts, but Nationstar denies, that Nationstar accepted its offer and agreed to sell and assign the certificate of sale to Schiller for \$935,000. On April 17, 2013, Schiller sent Nationstar an agreement memorializing the parties' alleged understanding that Nationstar would proceed with the confirmation of the judicial sale and instruct the foreclosure selling officer to issue the deed conveying title to the property to Schiller in exchange for Schiller's payment of \$935,000. But on April 22, 2013, Nationstar's attorney advised Schiller's attorney that there was *no* agreement between the parties and that Nationstar planned to proceed with the confirmation of the judicial sale and instruct the selling officer to issue the deed to Nationstar. Neither party signed the agreement.

¶ 4 The next day, Schiller's attorney tendered a cashier's check in the amount of \$935,000 to Nationstar's attorney, but the attorney refused to accept the check. Nationstar proceeded with confirmation of the judicial sale and requested the deed conveying title to the property be issued to Nationstar.

¶ 5 Shortly thereafter, Schiller filed a complaint for specific performance of the oral agreement and later amended the complaint. Nationstar answered Schiller's complaint and asserted as an affirmative defense that the statute of frauds barred Schiller's specific performance claim because no written agreement between the parties existed as to the sale of the property.

¹ Nationstar was the plaintiff's assignee in the separate foreclosure proceeding—*Aurora Loan Services, LLC v. Michael Giorange, et al.*, case number 13 CH 12476.

Schiller responded that the equitable doctrine of part performance barred application of the statute of frauds because it fully performed its obligations under the contract by tendering the cashier's check to Nationstar.

¶ 6 Nationstar then moved to dismiss Schiller's second amended complaint pursuant to section 2-619(a)(7) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(7) (West 2012)) asserting that the statute of frauds barred Schiller's claims because no written agreement existed and that Schiller's attempted payment was insufficient to invoke the equitable doctrine of part performance. The trial court dismissed Schiller's second amended complaint with prejudice.

¶ 7 Schiller's sole contention on appeal is that the trial court erred in finding that the statute of frauds barred its claim for specific performance of an oral agreement to convey real property because it fully performed under the agreement.

¶ 8 A section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts an affirmative defense or other matter that avoids or defeats the plaintiff's claim. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 20; *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "Affirmative matter" includes any defense other than one that negates an essential allegation of a plaintiff's cause of action. *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 115 (1993). A defendant may assert as an affirmative defense that the plaintiff's claim is unenforceable under the statute of frauds. 735 ILCS 5/2-619(a)(7) (West 2012); *Oliva v. Amtech Reliable Elevator Co.*, 366 Ill. App. 3d 148, 155 (2006); *Shugan v. Colonial View Manor*, 107 Ill. App. 3d 458, 464 (1982). We review the trial court's ruling on a section 2-619 motion to dismiss *de novo*. *Lutkauskas v. Ricker*, 2015 IL 117090, ¶ 29.

¶ 9 The Illinois statute of frauds is set forth in the Frauds Act (740 ILCS 80/0.01, *et seq.* (West 2012)) and provides:

"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 person thereunto by him lawfully authorized in writing, signed by such party." 740 ILCS 80/2 (West 2012).

Under the statute of frauds, a party generally cannot enforce a real estate contract unless: "(1) there is a written memorandum or note on one or more documents; (2) the documents collectively contain a description of the property and the terms of sale, including price and manner of payment; and (3) the memorandum or note contains the signature of the party to be charged." *Prodromos v. Poulos*, 202 Ill. App. 3d 1024, 1028 (1990).

¶ 10 The purpose underlying the writing requirement is not to permit parties to repudiate contracts that they have made, but to prevent the fraudulent enforcement of asserted contracts that were not, in fact, made. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1096-97 (2003) (quoting *Haas v. Cravatta*, 71 Ill. App. 3d 325, 328-29 (1979) (quoting Corbin, *Contracts*, §§ 317-20 at 393 (1952))). Indeed, the statute of frauds seeks to bar actions "based upon nothing more than loose verbal statements." *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 489 (1997). Thus, an oral contract to convey real property is generally unenforceable under the statute of frauds. *Leekha v. Wentcher*, 224 Ill. App. 3d 342, 349 (1991).

¶ 11 But the equitable doctrine of part performance is an exception to the statute of frauds and may permit enforcement of an oral contract for the conveyance of real property that must otherwise be in writing. *Anastaplo v. Radford*, 14 Ill. 2d 526, 537-38 (1958). Simply put, the

doctrine of part performance provides that the statute of frauds may not be used as a defense to performance of a contract where one party has performed. *Leekha*, 224 Ill. App. 3d at 349.

Courts recognize that when one party fully performs its part of an alleged oral contract, such performance strongly indicates the existence of a contract. *Meyer v. Logue*, 100 Ill. App. 3d 1039, 1043-44 (1981). To obtain relief under the doctrine of part performance,

" 'the court must find that the terms of the contract are clear, definite, and unequivocal, that the contract has been at least partially performed by the party seeking the remedy and that the acts allegedly done in performance are positively attributable exclusively to the contract.' " (citations omitted in original). *Intini v. Marino*, 112 Ill. App. 3d 252, 256 (1983) (quoting *Blaise v. Stein*, 75 Ill. App. 3d 793, 796 (1979)).

¶ 12 Schiller asserts that the statute of frauds does not bar its oral contract to purchase the property from Nationstar because its actions fall within the equitable doctrine of part performance, *i.e.*, it fully performed its obligations under the contract when it tendered the cashier's check to Nationstar. We find no merit in Schiller's claim.

¶ 13 Importantly, as pled in Schiller's second amended complaint, not only did Nationstar not execute the written agreement that Schiller sent to it regarding the conveyance of real property, but Nationstar also advised Schiller that there was no agreement before Schiller tendered the cashier's check. Although the doctrine of part performance may render an otherwise unenforceable agreement under the statute of frauds enforceable, the facts here do not support Schiller's reliance on that equitable doctrine. Indeed, the doctrine of part performance does not permit enforcement of a contract where, as here, it is undisputed that Nationstar advised Schiller the day before Schiller's "performance" that no contract existed. Moreover, Schiller's tender of the cashier's check was not based on reasonable reliance that a contract existed and its alleged

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full performance is insufficient to remove the statute of frauds as a bar to the enforcement of an oral agreement. See *Leekha*, 224 Ill. App. 3d at 350 (actions taken in anticipation of a contract are insufficient to invoke the doctrine of part performance); *Brunette v. Vulcan Materials Co.*, 119 Ill. App. 2d 390, 397-98 (1970) (performance must be in reasonable reliance on a contract for the doctrine of part performance to apply). Consequently, the trial court did not err in dismissing Schiller's complaint on the basis that the statute of frauds bars its claim for specific performance of an alleged oral agreement to convey real property.

¶ 14 Affirmed.