2016 IL App (5th) 150060-U

NO. 5-15-0060

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

R.P. LUMBER COMPANY, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 14-SC-496
	)	
TONY GREEN,	)	Honorable
	)	Christy W. Solverson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: Where R.P. Lumber Co., Inc. and Tony Green made an oral modification to a written agreement and did not formalize the modification in writing, the statute of frauds bars R.P. Lumber from recovery on its claims connected to the modification. Where Tony Green stipulated to one written charge for goods sold, we modify the trial court's judgment to reflect that stipulation.

¶ 2 Tony Green, a building contractor, appeals from the trial court's judgment against him for charges made to his commercial credit account by a third party. R.P. Lumber and Green had a written agreement. The parties orally modified the agreement to allow a third party to make charges, but after one month, Green claims that he revoked that agreement. The agreement to allow the third party to make charges was not formalized in

writing. The third party made charges and Green did not pay R.P. Lumber. R.P. Lumber filed suit against Green for breach of contract. Green argued that the statute of frauds governed the agreement and barred recovery. Following a bench trial, the trial court entered judgment against Green. Green appeals and argues that the trial court erred in not applying the statute of frauds. We agree with Green's argument that the statute of frauds applied to the oral modification to the original written agreement.

¶ 3 FACTS

¶ 4 R.P. Lumber and Tony Green (as owner of Preferred Construction) entered into a written "commercial charge" agreement on March 5, 2007. Green "expressly agree[d] to make payment in full for all purchases in accordance with invoice(s)." By the terms of the agreement, Green was the only person with the authority to charge building materials on account.

¶ 5 In 2014, R.P. Lumber filed suit against Green for charges on Green's account dated on or after May 2, 2012. The outstanding balance was $9,044.85.

¶ 6 Green filed his answer and raised three affirmative defenses: that pursuant to the terms of the application for credit, he was the only party authorized to make charges; that the charges in question were unauthorized; and that the Illinois statute of frauds (810 ILCS 5/2-201 (West 2012)) barred recovery.

¶ 7 On November 3, 2014, the case went to trial. Because there is no trial transcript, the facts that follow are taken from the bystander's report prepared after trial. Green testified that in April 2012, he contacted R.P. Lumber and verbally told them to change the charge agreement to allow a third party, Rob Pinski, to make charges on his account.

R.P. Lumber and Green did not memorialize this contract modification in writing. Prior to May 2, 2012, Green had paid all third-party charges made by Pinski. On May 2, 2012, the relationship between Green and Pinski changed. Green informed Pinski that he could no longer make any charges on his R.P. Lumber account. Also on May 2, 2012, Green contacted R.P. Lumber and verbally informed two of its employees, Doug Earnsting and Jeff Reno, that Pinski could no longer charge on his account. After May 2, 2012, Pinski continued to make charges to Green's account. Doug Earnsting testified at trial that he obtained oral consent from Green on every Pinski charge request after May 2, 2012. Earnsting also identified one of the outstanding bills for $1,179.22 that Green himself signed. Pinski alone signed all of the other outstanding invoices. Green testified that he never gave Earnsting oral consent for Pinski's charges.

¶ 8 Following the bench trial, the judge made the following findings: that Green did not dispute that he maintained an open line of credit with R.P. Lumber; that Green did not dispute that he authorized other individuals to purchase materials using his line of credit; and that Green did not prove that he terminated the agreement or that he did not authorize Pinski's charges. On November 13, 2014, the court entered judgment in favor of R.P. Lumber in the amount requested. Thereafter, the trial court ordered Green to pay R.P. Lumber's attorney fees and costs for $1,696.

¶ 9 Green filed a motion to reconsider, arguing that the judgment was erroneous because the statute of frauds controlled the contract and there was no written agreement allowing Pinski to make charges on Green's account. The trial court denied the motion on January 14, 2015. Green timely filed his appeal in this court.

¶ 10 LAW AND ANALYSIS

¶ 11 This case was tried without a jury. On appeal from a bench trial, we will not overturn a judgment unless we find that the trial court's judgment was contrary to the manifest weight of the evidence. *Jackson v. Bowers*, 314 Ill. App. 3d 813, 818, 731 N.E.2d 1252, 1257 (2000). A judgment is contrary to the manifest weight of the evidence if it is evident that the trial court should have reached the opposite conclusion. *Comm v. Goodman*, 6 Ill. App. 3d 847, 853, 286 N.E.2d 758, 763 (1972).

¶ 12 Green asks this court to overturn the judgment. He contends that the Frauds Act mandates that an agreement must be in writing in order to hold one party responsible for the debts of a third party. 740 ILCS 80/1 (West 2012). In addition, he argues that because Pinski's charges exceeded $500, the statute of frauds section of the Uniform Commercial Code requires that the contract for sale be in writing. 810 ILCS 5/2-201(1) (West 2012).

¶ 13 The Frauds Act provides guidance on the requirement of a written and signed document in certain transactions. The statute, which has been in effect since July 1, 1874, states as follows:

> "No action shall be brought *** whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person *** unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." 740 ILCS 80/1 (West 2012).

¶ 14 More currently, the Uniform Commercial Code, enacted in Illinois on July 1, 1962, contains its own statute of frauds. That section states that:

> "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker." 810 ILCS 5/2-201(1) (West 2012).

An oral contract may be enforceable pursuant to the statute of frauds, but only in a situation where "the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made." 810 ILCS 5/2-201(3)(b) (West 2012).

¶ 15 Illinois courts have consistently stated that the purpose of the statute of frauds is to prevent frauds–" 'to give greater security to property, to guard against false contracts, set on foot by fraud and supported by perjury.' " *Fleming v. Dillon*, 370 Ill. 325, 332, 18 N.E.2d 910, 914 (1938); *Rosewood Care Center, Inc. v. Caterpillar, Inc.*, 226 Ill. 2d 559, 568, 877 N.E.2d 1091, 1096 (2007) (quoting *Hite v. Wells*, 17 Ill. 88, 90 (1855)). The Illinois Supreme Court further explained the underlying purpose of the statute as follows:

> " 'The plain object of the statute is to require higher and more certain evidence to charge a party, where he does not receive the substantial benefit of the transaction, and where another is primarily liable to pay the debt or discharge the duty; and thereby to afford greater security against the setting up of fraudulent demands, where the party sought to be charged is another than the real debtor, and whose

debt or duty, on performance of the alleged contract by such third person, would be discharged.' " *Rosewood Care Center, Inc.*, 226 Ill. 2d at 568, 877 N.E.2d at 1096 (quoting *Eddy v. Roberts*, 17 Ill. 505, 506 (1856)).

Furthermore, a party cannot use the statute of frauds as a defense if the effect is to accomplish a fraud. *Fleming*, 370 Ill. at 332-33, 18 N.E.2d at 914.

¶ 16 The original agreement between R.P. Lumber and Green contains simple terms. Only Tony Green is listed on that agreement as a person authorized to make charges. While there was an oral "modification" that authorized Pinski to use Green's account, Green claims that he revoked this "modification." Green contended at trial, and now contends on appeal, that the original oral modification is not in compliance with the statute of frauds. As a result, any revocation of this "invalid oral modification" is irrelevant. In response, R.P. Lumber contends that the oral modification took this contract out of the statute of frauds, and furthermore, that Green did not revoke the oral modification. At trial, R.P. Lumber based its claim, in part, on a factual premise–that Green never revoked the agreement to allow Pinski to make charges to his account. R.P. Lumber interprets the court's judgment as effectively negating Green's statute of frauds defense.

¶ 17 The Frauds Act requires that an agreement to pay the debts of "another person" be in writing. 740 ILCS 80/1 (West 2012). Pursuant to section 2-201(1) of the Uniform Commercial Code, if the agreement involves more than $500, the agreement cannot be enforced unless the agreement is in writing. 810 ILCS 5/2-201(1) (West 2012). If the party admits in his pleadings or at trial that the contract for sale occurred, then the

Uniform Commercial Code recognizes this as an exception to the writing requirement. 810 ILCS 5/2-210(3)(b) (West 2012). Green did not admit in his pleadings or testimony at trial that the oral promise remained in effect at the times when Pinski charged on his account, and so Green made no admission that would qualify as exception to the written contract requirement of the statute of frauds.

¶ 18 R.P. Lumber argues that we should affirm the trial court because the statute of frauds does not apply if one party (R.P. Lumber) has fully complied with the agreement and all that remains is for the other party (Green) to pay. R.P. Lumber contends that the rationale behind the unilateral full performance concept is legally sound in that one party should not be allowed to rely upon the statute of frauds to avoid his obligations to pay when the other party has already performed.

¶ 19 R.P. Lumber cites to *Noesges v. Servicemaster Co.*, 233 Ill. App. 3d 158, 598 N.E.2d 437 (1992), in support of this theory. In *Noesges*, the parties had a service-based oral contract for the creation of software that included employment and royalties. *Id.* at 159-60, 598 N.E.2d at 439. Noesges performed and requested payment for royalties and Servicemaster declined. *Id.* The appellate court held that if one party reasonably relied upon the oral contract and performed its services, "it would be unfair to allow the other party to accept the benefits under the contract but to avoid its reciprocal obligations by asserting the Statute of Frauds." (Internal quotation marks omitted.) *Id.* at 163, 598 N.E.2d at 441; see also *Mapes v. Kalva Corp.*, 68 Ill. App. 3d 362, 386 N.E.2d 148 (1979) (statute of frauds would not apply where the plaintiff worked one year with a verbal employment contract); *Thomas v. Moore*, 55 Ill. App. 3d 907, 370 N.E.2d 809

(1977) (statute of frauds does not apply to an oral real estate contract where the buyer has paid for the real estate, taken possession, and made improvements); *Lund v. E.D. Etnyre & Co.*, 103 Ill. App. 2d 158, 242 N.E.2d 611 (1968) (statute of frauds does not apply when plaintiff designs a product for defendant pursuant to a verbal agreement and defendant benefits because of sales of the product); *Hills v. Hopp*, 287 Ill. 375, 122 N.E. 510 (1919) (statute of frauds did not apply to oral contract made by defendant with plaintiffs where he agreed to buy back a stock if the plaintiffs were dissatisfied with its performance).

¶ 20 The flaw in R.P. Lumber's argument is that its contract was with Green–not Pinski. *Noesges* and other similar cases are distinguishable because of the presence of the third party. Noesges created a software product for Servicemaster. Thus, the company received a direct benefit from Noesges. In contrast here, not only was Pinski a third party, there also was no proof that Green received any benefit from R.P. Lumber's decision to let Pinski buy supplies on credit.

¶ 21 Agreements holding one party liable for the debts of a third party and agreements for the sale of goods in excess of $500 must be in writing. 740 ILCS 80/1 (West 2012); 810 ILCS 5/2-201(1) (West 2012). Both of these statutes apply in this case. The facts of this case represent a perfect example of what the statute of frauds was designed to prevent, that is, to guard against oral contracts supported by false testimony. *Fleming*, 371 Ill. at 332, 18 N.E.2d at 914. Therefore, we find that the trial court's witness credibility determinations were improper. Because the agreement allowing Pinski to charge to Green's account was not in writing, the statute of frauds bars R.P. Lumber from

collecting money from Green for the associated charges. We find that the trial court's November 13, 2014, judgment is contrary to the manifest weight of the evidence.

¶ 22 We also note that at oral argument, Green stipulated that he owes R.P. Lumber for invoice 1205-473803 signed only by Green, dated May 2, 2012, in the amount of $1,179.22. That invoice bears his signature. Therefore, we modify the judgment against Green to the amount of $1,179.22.

¶ 23 CONCLUSION

¶ 24 Pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the judgment of the Jackson County circuit court in favor of R.P. Lumber and against Green to $1,179.22.

¶ 25 Judgment modified.