NOTICE
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2011 IL App (5th) 110041-U

NO. 5-11-0041

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

MARY MAGDALINE THOMPSON, GEORGIA LEE COWGER, and DONNA JEAN HOOKE, Plaintiffs-Appellees, v. TAMMY L. BEBOUT, Defendant-Appellant, and BARBARA L. MITCHELL and ELEANOR L. CHERRY, Defendants. TAMMY L. BEBOUT, Counterplaintiff, v. MARY MAGDALINE THOMPSON, GEORGIA LEE COWGER, and DONNA JEAN HOOKE, Counterdefendants.	)	Appeal from the Circuit Court of Saline County. No. 07-CH-61 Honorable Todd D. Lambert, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

O R D E R

¶ 1 *Held*: A settlement agreement which involved the sale of land, reached at a deposition at which the parties were present, which was stated and orally agreed to by both parties on the record and recorded by the court reporter, was

not unenforceable by reason of the statute of frauds.

¶ 2 This case began as an action to reform a deed that purported to convey 10 acres, but by which the parties intended to convey only 9 acres. The complaint alleges the following factual situation. The common grantor originally owned 10 acres and conveyed 1 acre to the plaintiffs' predecessor in title. This one-acre tract included a residence in which the plaintiffs' predecessors in title, and eventually the plaintiffs, resided. At all times, the plaintiffs and their predecessors in title paid all real estate taxes and had exclusive use and possession of the one-acre tract.

¶ 3 The original grantor retained only 9 acres, which he conveyed to the defendant's predecessors in title but, due to mutual mistake and scrivener's error, the deed described the original 10 acres, including the plaintiffs' 1-acre tract. At all times, the defendant's predecessors in title and the defendant had exclusive use and possession of, and paid real estate taxes on, only nine acres.

¶ 4 When the plaintiffs discovered the error in the legal description of the property conveyed to the defendant, they filed in the circuit court of Saline County an action to reform the deeds to accurately reflect the land intended to be conveyed, or alternatively to be declared the owners of the one-acre tract by adverse possession.

¶ 5 The case proceeded through discovery, and the deposition of the defendant, Tammy L. Bebout, was taken. During this deposition, the plaintiffs' attorney repeatedly asked the defendant whether she thought she was buying 10 acres or 9 acres and whether she believed the property she purchased was improved with a residence. She refused to answer these questions. The questions were straightforward and it is clear from the record that the defendant simply did not want to answer them honestly and did not want to lie under oath. The plaintiffs' attorney asked to confer off the record with the defendant's counsel.

¶ 6 After this off-the-record conference, the plaintiffs' attorney announced on the record

that the parties had reached a settlement agreement which they wished to make a matter of record. The plaintiffs' attorney stated the agreement as follows: "Tammy Bebout will receive $5,000 in good funds, in consideration for the transfer to the Plaintiffs in this cause [*sic*] the real property being the one acres [*sic*] that is–one acre that is the subject matter of the cause ***." The plaintiffs' attorney proposed that the closing be held Friday, November 13, 2009, at his office. The defendant's attorney asked the defendant, "Tammy, any time is okay?" and the defendant responded, "It's okay." The attorneys agreed to meet at noon. The defendant's attorney asked the defendant if that was all right and she responded, "Yeah." The defendant's attorney agreed that the plaintiffs' counsel had accurately stated the agreement. When the defendant did not show up for the closing, and refused to honor the settlement agreement, the plaintiffs filed a motion to enforce the settlement agreement.

¶ 7 The defendant filed a motion in response to the motion to enforce settlement agreement and a memorandum in support thereof in which she argues that the settlement agreement is not enforceable because it is an oral, unsigned contract for the sale of lands and violates section 2 of the Frauds Act (statute of frauds) (740 ILCS 80/2 (West 2010)). The response also argues that the settlement agreement is unenforceable on one or more of the following grounds: a lack of meeting of the minds, duress and/or coercion, lack of counsel's authority to consent to the agreement, and prompt objection to the agreement by the defendant.

¶ 8 Attached to the memorandum is the affidavit of the defendant in which she states that she was very nervous and stressed during her deposition. She goes into detail about the bases of her stress and nervousness. She felt harrassed by the plaintiffs' attorney and threatened by his statements to defense counsel about sanctions and perjury. She was very worried about the high attorney fees she owed. She was confused and her attorney was not adequately helping her. She did not understand what was happening and her attorney did not

explain it to her. She did not understand the settlement agreement as stated by the plaintiffs' counsel and her attorney did not explain it to her.

¶ 9 The affidavit continues that after the deposition, the defendant consulted other counsel. She then told her attorney that she was rejecting the "proposal" made in the deposition. She never authorized her counsel to enter into any settlement agreement. She did not believe any agreement had been reached and believed she had rejected the settlement offer.

¶ 10 A hearing was held on the motion and response thereto on December 3, 2010. No evidence was presented other than the transcript of the defendant's deposition and the affidavits of the parties. On January 4, 2011, the circuit court of Saline County entered an order finding that the parties had entered into a legally enforceable contract at the deposition and that the parties' agreement does not violate the statute of frauds. The defendant appeals, raising the same arguments she did before the circuit court. For reasons that follow, we affirm.

¶ 11 We begin with the proper standard of review, on which the parties agree. In this case the circuit court heard no live testimony. The circuit court was not required to gauge the demeanor and credibility of witnesses. Instead, the circuit court made factual findings based upon the exact record presented to both the appellate and the circuit courts. Without having heard live testimony, the circuit court was in no superior position than any reviewing court to make findings, and so a more deferential standard of review is not warranted. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Where the evidence before a circuit court consists of depositions, transcripts, or evidence otherwise documentary in nature, a reviewing court is not bound by the circuit court's findings and may review the record *de novo*. *Addison Insurance Co.*, 232 Ill. 2d at 453. Accordingly, our review is *de novo*.

¶ 12 The first issue presented in this appeal is whether a settlement agreement that involved

the sale of land, reached at a deposition at which the parties were present, which was stated and orally agreed to by both parties on the record and recorded by the court reporter, was unenforceable by reason of the statute of frauds. The circuit court held that the agreement did not violate the statute of frauds. We agree.

¶ 13 Section 2 of the Frauds Act provides in pertinent part, "No action shall be brought to charge any person upon any contract for the sale of lands, *** unless such contract or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith ***." 740 ILCS 80/2 (West 2010). The purpose of the statute of frauds is "the prohibition of those 'many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury.' " *McInerney v. Charter Golf, Inc.*, 176 Ill. 2d 482, 489 (1997) (quoting 29 Charles II ch. 3, introductory clause (1676)). In other words, the purpose of the statute of frauds is to prevent perjury and fraud in enforcing parol contracts. *Gideon Service Division v. Dunham-Bush, Inc.*, 80 Ill. App. 3d 633, 637 (1980). The statute seeks to achieve this purpose by barring actions based upon nothing more than loose verbal statements. *McInerney*, 176 Ill. 2d at 489. The statute functions more as an evidentiary safeguard than as a substantive rule of contract and as such exists to protect not just the parties to a contract, but also to protect the fact finder from charlatans, perjurers, and the problems of proof accompanying oral contracts. *McInerney*, 176 Ill. 2d at 489.

¶ 14 In keeping with this purpose, there exist numerous exceptions to the statute of frauds' writing requirement which permit the enforcement of certain oral contracts otherwise required to be in writing by the statute of frauds. *McInerney*, 176 Ill. 2d at 489. For example, the doctrine of full performance provides that where one party completely performs under a contract, the contract is enforceable and the statute of frauds may not be used as a defense. *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009). This is because when one party fully performs his part of the alleged oral contract, the courts recognize that this very

performance strongly indicates the existence of a contract. *Anderson*, 397 Ill. App. 3d at 785. As the court pointed out, such performance tends to minimize the dangers that the statute of frauds was designed to prevent. *Anderson*, 397 Ill. App. 3d at 785.

¶ 15 An oral settlement agreement reached in the presence of a trial judge during a settlement conference has been held not to be subject to the provisions of the statute of frauds. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1096 (2003). Quoting from a California case, *Kohn v. Jaymar-Ruby, Inc.*, 28 Cal. Rptr. 2d 780, 782 (Cal. Ct. App. 1994), the court stated:

> " '[T]he concern addressed by the statute of frauds is not present when, as here, a neutral court participates in the settlement process by assisting the parties to formulate the terms of the settlement. In so doing, the court assures itself that the parties are being truthful and acting in good faith, and also that they each comprehend the scope of the agreement.' " *Rose*, 343 Ill. App. 3d at 1096.

¶ 16 As the court pointed out, the purpose of the writing requirement of the statute of frauds is not to enable parties to repudiate contracts that they have in fact made, but to prevent the fraudulent enforcement of asserted contracts that were in fact not made. *Rose*, 343 Ill. App. 3d at 1097. Any possibility of fraud is negated by the circumstances of the making of the contract in the presence of the trial judge and so the statute of frauds does not apply to render the oral contract unenforceable. *Rose*, 343 Ill. App. 3d at 1097.

¶ 17 Similarly, in *Kalman v. Bertacchi*, 57 Ill. App. 3d 542, 549-50 (1978), a settlement agreement involving the sale of land arrived at by the parties to an action and stated in open court, dictated to a court reporter and made a matter of record, which each of the parties and their respective attorneys agreed to and understood, all while under the guidance and supervision of the court, was held not to be subject to the statute of frauds because the mischiefs anticipated by the statute could not arise in such a case. The court held that while

record testimony has no signature, a signature's only purpose is authentication, and this is amply supplied in the case of an admission in court. *Kalman*, 57 Ill. App. 3d at 549-50. The court held that the purpose of the statute of frauds is not forsaken in view of the fact that proof of the existence of an agreement is a matter of court record and cannot be disputed. *Kalman*, 57 Ill. App. 3d at 549-50.

¶ 18 With respect to the statute of frauds' requirement that a contract for the sale of land be signed by the party sought to be charged, "signed" has always been understood to encompass more than the narrow definition of a subscription in the handwriting of the author of the instrument. *Just Pants v. Wagner*, 247 Ill. App. 3d 166, 173 (1993). A writing has been considered "signed" for the purpose of the statute of frauds even if it merely contains something which manifests that the instrument has been executed or adopted by the party to be charged with it. *Just Pants*, 247 Ill. App. 3d at 173. The statute of frauds merely requires that the party executed or *adopted* the agreement. *Just Pants*, 247 Ill. App. 3d at 173.

¶ 19 The law has consistently interpreted "signed" to embody not only the act of subscribing a document, but also anything which can reasonably be understood to symbolize or manifest the signer's intent to adopt a writing as his or her own and be bound by it. *Just Pants*, 247 Ill. App. 3d at 173-74. Thus, it has been held that a deposition may qualify as a signed writing for statute of frauds purposes. *Bower v. Jones*, 978 F.2d 1004, 1009 (7th Cir. 1992). The court in *Bower*, 978 F.2d at 1009, held that to the extent the statute of frauds' purpose is viewed as evidentiary, it is difficult to see why the statute should not be satisfied by a written admission in a pleading, stipulation, or deposition. As we have already pointed out, our supreme court does view our statute of frauds' purpose as primarily an evidentiary safeguard. *McInerney*, 176 Ill. 2d at 489.

¶ 20 Accordingly, whether viewed as an exception to the statute of frauds' requirement of a signed writing, or viewed as a signed writing in itself, the defendant's verbal assent to the

oral agreement, made under oath in her deposition, and recorded and transcribed by a court reporter, is sufficient to remove this case from the bar of the statute of frauds. Under these circumstances, the fact finder is protected from "charlatans, perjurers and the problems of proof accompanying oral contracts." *McInerney*, 176 Ill. 2d at 489. The mischiefs anticipated by the statute of frauds do not arise in such a case and the circumstances negate the possibility of fraud and minimize the dangers that the statute of frauds was designed to prevent. Accordingly, enforcement of the settlement agreement is not barred by the statute of frauds.

¶ 21 Alternatively, the defendant argues that enforcement of the settlement agreement is barred on several other grounds, including a lack of meeting of the minds as to the terms of the agreement, duress and/or coercion, lack of authority by her counsel to enter into the agreement, and the defendant's prompt objection to the agreement. She argues that these grounds individually and cumulatively render the settlement agreement unenforceable.

¶ 22 The defendant first argues that there was no meeting of the minds because she believed that a mere proposal was being stated, not an agreement. Despite her affidavit to this effect, the transcript of the deposition itself paints a different picture. It is clear on the record that the plaintiffs' attorney was referring to a settlement *agreement*, not a proposal, and that the defendant assented to this agreement and further agreed to a meeting date to complete performance under the agreement. The defendant expressed no misgivings about the agreement at the time of her deposition. Clearly she changed her mind after the agreement was entered into, but there was a meeting of the minds at the deposition.

¶ 23 The defendant also argues that enforcement of the agreement is barred because she entered into it under duress and/or coercion. She argues that she was extremely nervous and stressed during her deposition. She claims to have been pressured by the plaintiffs' attorney repeatedly asking her the same questions. She claims that she attempted to answer those

questions but that the plaintiffs' counsel continued to ask them. Again, the record of the deposition belies this claim. The plaintiffs' counsel repeatedly asked the same questions because the defendant obstinately refused to answer them. She claims that references by the plaintiffs' attorney to sanctions and perjury induced stress. Again, these references were a result of the defendant's refusal to answer straightforward questions. She claims that she did not understand everything that was said at the deposition, that her attorney was not helping her, and that she was worried about attorney fees. This is the kind of stress that any layperson/party is subjected to at a deposition. It does not rise to the level of duress, which has been defined as "the imposition, oppression, undue influence or the taking of undue advantage of the stress of another whereby one is deprived of the exercise of his free will." *In re Marriage of Smith*, 164 Ill. App. 3d 1011, 1022 (1987). We find no evidence of coercion or duress.

¶ 24 The defendant argues that enforcement of the settlement agreement is barred because her attorney lacked authority to enter into the agreement. It has been held that where a party is present in open court and permits his attorney to act on his behalf, that party may not subsequently deny his attorney's apparent authority to act. *In re Marriage of Gibson-Terry*, 325 Ill. App. 3d 317, 322 (2001). While the deposition in the case at bar did not occur in open court, we see no reason why a different rule should apply. The defendant was present with her attorney when the settlement agreement was entered into. She did not deny or question his authority to act on her behalf. She cannot deny it now.

¶ 25 Finally, the defendant argues that she acted promptly in objecting to the settlement agreement once she learned of it, thereby "nullifying" the agreement. She cites no law in support of this argument, and we do not agree that simply objecting to an otherwise lawful contract is sufficient to "nullify" it.

¶ 26 The circuit court did not err in finding that the parties had entered into a legally

enforceable contract at the deposition and that the parties' agreement does not violate the statute of frauds.

¶ 27 For the foregoing reasons, the judgment of the circuit court of Saline County is hereby affirmed.

¶ 28 Affirmed.