2012 IL App (5th) 110508-U

NO. 5-11-0508

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

SUSAN HOEM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 10-AR-796
	)	
BRENDA TAYLOR,	)	Honorable
	)	Thomas W. Chapman,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant waived her challenge to the denial of her motion for a directed judgment pursuant to section 2-1110 of the Code of Civil Procedure (735 ILCS 5/2-1110 (West 2002)), when she presented evidence on the merits of her defense. The trial court correctly determined that the statute of frauds was not an available defense where one party fully performed the contractual obligations under an oral contract for the sale of real estate, and its judgment in favor of the plaintiff is not against the manifest weight of the evidence.

¶ 2 The defendant, Brenda Taylor, appeals the trial court's entry of a judgment against her and in favor of the plaintiff, Susan Hoem, for $40,000, plus costs, in a case arising from the breach of an oral contract for the sale of real estate. On appeal, the defendant contends that the trial court erred in denying her motion for a directed judgment pursuant to section 2-1110 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2002)), because the plaintiff did not present sufficient evidence to make a *prima facie* case establishing the existence of an oral contract or a breach of that contract. The defendant also contends that provisions of the statute of frauds prevent any recovery in this case. We affirm.

¶ 3 The plaintiff, Susan Hoem, filed a complaint against the defendant, Brenda Taylor, and alleged a breach of an oral agreement for the sale of real property. The plaintiff filed the complaint in her capacity as the executor of the estate of Clyde Mertz, deceased (Estate), and individually, as a beneficiary of the Estate. The plaintiff alleged that her father, Clyde Mertz (Mertz), entered into an oral agreement to sell two parcels of real property located in Granite City, Illinois (the properties), to the defendant; that the defendant agreed to purchase the properties for the total sum of $40,000, but requested that Mertz execute deeds to the properties in the name of her grandmother, Mabel Barrall; that pursuant to the defendant's request, Mertz executed two quitclaim deeds in which he conveyed the properties in the name of Mabel Barrall; and that the defendant paid no part of the agreed purchase price despite demands to do so. The plaintiff sought $40,000 in contractual damages, plus the costs of the suit.

¶ 4 The defendant was personally served with the complaint and a notice directing her to appear in court on November 19, 2010. On that date, the defendant went to the circuit clerk's office and personally filed an answer and an affidavit and application to sue or defend as an indigent person. She left the courthouse without appearing in the courtroom. Meanwhile, the trial court called the case for a hearing. When the defendant did not appear, a default judgment was entered against her and in favor of the plaintiff. Subsequently, the defendant filed a motion to set aside the default judgment. She claimed that when she filed her pleadings on November 19, 2010, she was informed that she did not have to appear in the courtroom that day. On December 10, 2010, the trial court vacated the default judgment, noting that the defendant had filed an answer but had not personally appeared in court. The court granted the defendant's application to defend the case as an indigent person. The case was placed on the arbitration docket.

¶ 5 Following a hearing, the arbitration panel found in favor of the plaintiff and awarded

$40,000. The rejection fee was set at $500. The defendant filed a notice rejecting the arbitration award. In her notice, she asked for a waiver of the rejection fee due to her indigence, and she referred to her previously filed affidavit. In the affidavit, the defendant certified that she had limited income and that she had no equity in any real estate or automobiles. The plaintiff filed an objection to the waiver request. The plaintiff argued that the defendant was not entitled to proceed *in forma pauperis* because she was gainfully employed as a home health provider and because she owned the properties, and she sought an order directing the defendant to pay the rejection fee, or alternatively an order striking the defendant's answer. The trial court, with the agreement of counsel, decided to take evidence on the defendant's indigence and the waiver issue at the time of the bench trial.

¶ 6 On the day of the trial, the plaintiff requested that the waiver issue be heard and ruled on before he presented evidence on the merits of the case, and he sought to call the defendant as a witness on that issue. The defendant had obtained a different attorney, and the new attorney appeared without the defendant. When the trial court inquired as to the whereabouts of the defendant, the defendant's counsel advised that the defendant was on call, but he did not expect to call her as a witness unless the evidence was different than he expected. The trial court informed the defendant's attorney that the prior attorney had agreed to take up the waiver issue before the trial commenced. The defendant's attorney advised the court that he would phone the defendant and ask her to come to court. The court advised that the waiver matters would be taken up when the defendant arrived and directed the plaintiff to proceed to present her evidence on the merits.

¶ 7 Before the plaintiff took the stand, she offered four quitclaim deeds which were admitted into evidence without objection. All four deeds were prepared by the defendant. Two deeds were executed on May 5, 2008, and recorded in the office of the Madison County recorder on June 10, 2008. Those deeds show that Mertz had conveyed the two properties

to Mabel Barrall for one dollar and other good and valuable considerations. The other two deeds were executed on December 29, 2008, and recorded on July 20, 2009. Those deeds indicate that Mabel Barrall had conveyed the same two properties to the defendant for one dollar and other good and valuable considerations.

¶ 8 The plaintiff was called as a witness. The plaintiff told the court that Mertz was her father; that he passed away on December 17, 2008; that she had been appointed the executor of his estate; and that she and her sister, Victoria, are the surviving beneficiaries of Mertz's will. She stated that their mother, Marion Mertz, had passed away in April 2008, after a long battle with Alzheimer's disease. The plaintiff noted that her family became acquainted with the defendant when the defendant began to provide home health assistance to Victoria, who had been diagnosed with multiple sclerosis. Later, Mertz hired the defendant to provide in-home care for Marion. The plaintiff testified that Mertz sold the family home and various rental properties that he had been managing after her mother became ill. The plaintiff stated that Mertz had offered her the properties involved in this case, and that she declined his offer because she was living in Decatur at that time and did not feel she could properly manage them.

¶ 9 The plaintiff testified that in February 2008, she and the defendant had a conversation about the properties. The plaintiff recalled that during this conversation, the defendant said that she had a deal with Mertz and that she was going to purchase the properties from him for the sum of $40,000. The plaintiff also recalled that the defendant wanted to arrange for payment of the $40,000 through a personal loan, rather than a contract for deed, and that the defendant had prepared a handwritten document outlining proposed payment arrangements which she had given to Mertz. The plaintiff produced a copy of that document at trial, and said that the defendant had given her a copy of the document during their conversation. The plaintiff testified that the defendant mentioned that she had asked Mertz to put her

grandmother's name on the deeds to the properties because she wanted to consult a tax person to figure some things out before she was named on the deeds.

¶ 10 The plaintiff testified that after Mertz's death, she made several attempts to contact the defendant to request payment of the $40,000 owed to the Estate. The plaintiff stated that several calls were not returned, and that when she was able to make contact, the defendant did not deny that she owed the debt or that the properties had been conveyed for her benefit. The plaintiff stated that she hired a lawyer for purposes of collecting the debt and closing the Estate. The lawyer prepared a mortgage and promissory note. The documents identified the amount owed as $30,000, rather than $40,000, because the Estate owed the defendant $10,000 for the home health services she provided to the plaintiff's mother. The documents were intended to reflect a $10,000 credit against the $40,000 owed. The plaintiff testified that when the defendant was presented with the documents, she would not sign them. The plaintiff then delivered a check payable to the defendant in the sum of $10,000 to satisfy the amount the Estate owed to the defendant for her services. The defendant accepted the payment and returned a receipt to the plaintiff with a notation that the Estate still owed two years' taxes on the properties that had been sold to her. The plaintiff testified that the defendant did not pay any part of the $40,000 owed under the oral agreement.

¶ 11 During cross-examination, the plaintiff was asked to read verbatim a line in the deeds which stated that the properties had been conveyed "for and in consideration of the sum of One Dollar and other good and valuable considerations, the receipt of which is hereby acknowledged." The plaintiff testified that she was not with her father at the time he executed the deeds, that she did not know whether anything was handed to her father at that time, and that she would be guessing about whether anything was handed to him at that time.

¶ 12 At the close of the plaintiff's case, the defendant's attorney made an oral motion for a finding in favor of the defendant pursuant to section 2-1110 of the Code, arguing that the

plaintiff failed to produce evidence of a contract between Mertz and the defendant or a breach by the defendant. The trial court denied the motion. The defendant arrived in court. At that time, she was called to testify in the defendant's case-in-chief.

¶ 13 During direct examination, the defendant testified that she owned the properties involved in this case. The defendant stated that she borrowed $30,000 from her grandmother, Mabel Barrall, to pay for the properties, and that she had not yet repaid her. The defendant estimated that each property is worth no more than $20,000. The defendant stated that she filed her affidavit certifying that she had no equity in any real properties because she did not have equity in her own residence and because she owed $30,000 to her grandmother for the properties she had purchased from Mertz. The defendant testified that she gave Mertz $30,000 in cash and that the payment was made with money she had gotten from her grandmother. The defendant testified that $10,000 remained unpaid. During cross-examination, the defendant testified that she considered $10,000 to be the most she owed under her deal with Mertz. The defendant stated that she informed the plaintiff that she had paid some money on the house, but she did not specifically mention how much she had paid because her agreement was not with the plaintiff. The defendant stated that she would not sign the mortgage and promissory note that had been presented to her because she had been advised that under the ordinances in Granite City she would not be permitted to rent out any properties which were mortgaged. The defendant acknowledged that there were no liens on the properties at the time she completed her *in forma pauperis* affidavit.

¶ 14 During rebuttal, the plaintiff testified that prior to the trial, the defendant never claimed that she had paid $30,000 to Mertz for the properties. The plaintiff never heard the defendant or anyone else claim that Mabel Barrall paid Mertz for the properties. During cross-examination, the plaintiff admitted that she was not with Mertz when he executed the quitclaim deed and she did not know whether any cash was handed to him at that time.

During redirect examination, the plaintiff stated that she had been helping Mertz with his finances from January 2008 until his death and that he was in the habit of informing her about his finances. The plaintiff testified that Mertz never stated or otherwise indicated that the defendant had made any payments toward the purchase of the properties, and that she never saw him carrying a large amount of cash.

¶ 15 After the parties rested, the trial court issued a ruling from the bench, finding in favor of the plaintiff in the sum of $40,000, plus costs. This appeal followed.

¶ 16 In the first point on appeal, the defendant contends that the trial court erred when it denied her motion for a judgment in her favor pursuant to section 2-1110 of the Code. The plaintiff claims that the issue is not properly before this court because the defendant waived the section 2-1110 motion when she offered evidence in support of her defense. The defendant contends that her testimony was limited to the issues surrounding her motion for a waiver of the arbitration fee and that she did not present evidence on the merits of the case.

¶ 17 Section 2-1110 of the Code states as follows:

> "§ 2-1110. Motion in non-jury case to find for defendant at close of plaintiff's evidence. In all cases tried without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. If the ruling on the motion is favorable to the defendant, a judgment dismissing the action shall be entered. If the ruling on the motion is adverse to the defendant, the defendant may proceed to adduce evidence in support of his or her defense, in which event the motion is waived." 735 ILCS 5/2-1110 (West 2002).

¶ 18 The transcript of the proceedings shows that this case was tried before the court without a jury. At the close of the plaintiff's evidence, the defendant moved for a judgment

in her favor pursuant to section 2-1110 of the Code. After the court denied the motion, the defendant took the witness stand and offered testimony on the waiver issue and on the merits of her defense. The defendant did not request that her testimony be considered only for the limited purpose of the waiver issue. The record does not support the defendant's contention that she limited her testimony to the waiver issue. When the defendant presented evidence supporting her defense, she waived any challenge to the trial court's unfavorable ruling on her section 2-1110 motion. 735 ILCS 5/2-1110 (West 2002); *Fear v. Smith*, 184 Ill. App. 3d 51, 55, 539 N.E.2d 1297, 1299-1300 (1989).

¶ 19 Next, as an alternative argument, the defendant argues that the statute of frauds prevents any recovery in this case. In response, the plaintiff argues that Mertz fully performed his promises and obligations under the oral contract and that full performance is sufficient to avoid application of the statute of frauds.

¶ 20 Section 2 of the Frauds Act states in part, "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 the contract 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 in writing, signed by such party." 740 ILCS 80/2 (West 2008). Under the doctrine of full performance, where one party completely performs 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, 922 N.E.2d 8, 19 (2009). The courts have reasoned that when one party fully performs his part of an alleged oral contract, the full performance strongly indicates the existence of a contract and minimizes the danger of the false claims that a statute of frauds was designed to prevent. *Anson v. Haywood*, 397 Ill. 370, 379, 74 N.E.2d 489, 493-94 (1947); *Anderson*, 397 Ill. App. 3d at 785, 922 N.E.2d at 19. The existence of an oral contract, its terms, and the intent of the

parties are questions of fact, and the trial court's determinations on these questions will be disturbed only if they are against the manifest weight of the evidence. *Anderson*, 397 Ill. App. 3d at 785, 922 N.E.2d at 18.

¶ 21 In this case, there is no dispute that the alleged agreement between Mertz and the defendant was not set out in writing. The evidence at trial established that Mertz and the defendant had reached an oral agreement whereby Mertz promised to sell the properties to the defendant and that the defendant promised to pay $40,000 to Mertz for the properties. The evidence further established that Mertz fully performed his obligations under the oral agreement. There is conflicting testimony as to whether Mertz received any payments toward the $40,000 purchase price. The plaintiff testified that the defendant did not pay any portion of the purchase price. The plaintiff also testified that during various conversations with the defendant, the defendant never claimed that she or anyone on her behalf, including her grandmother, had paid any portion of the purchase price to Mertz or anyone on his behalf. The plaintiff stated that she began to assist Mertz with his finances in January 2008, that Mertz routinely confided in her about his finances, and that he did not state or otherwise indicate that he had received a cash payment from the defendant or her grandmother. She also noted that Mertz did not have a large amount of cash in his possession at any time in 2008. The defendant acknowledged that she had a deal with Mertz for the sale of the two properties and that the purchase price was $40,000. She also acknowledged that she was the record owner of the properties. The defendant testified that she handed Mertz $30,000 in cash, that she borrowed the money from her grandmother in order to pay him, and that the most she owed under the deal was $10,000. The defendant did not produce a receipt or other document evidencing a cash payment to Mertz. In this case, the trial court, as fact finder, was charged with determining the credibility of the witnesses and the weight to be given the testimony. Given that the defendant had prepared the deeds, a payment schedule, and various

receipts, the trial court could have reasonably questioned the portion of the defendant's testimony in which she stated that she paid $30,000 in cash to Clyde Mertz. Based on the evidence and reasonable inferences, the trial court could have reasonably found that Mertz and the defendant had an oral contract for the sale of the properties for the sum of $40,000, that Mertz had fully performed his obligations under the oral contract, and that the defendant paid nothing toward the agreed purchase price. Having found that Mertz had fully performed his obligations under the oral contract, the trial court correctly determined that section 2 of the Frauds Act was not an available defense.

¶ 22 The defendant also argued that section 1 of the Frauds Act (740 ILCS 80/1 (West 1994)) would prevent recovery in this case, should the plaintiff attempt to argue on appeal that the oral agreement was between Mertz and the defendant's grandmother and that the defendant had orally agreed to pay her grandmother's debt. The plaintiff did not raise that argument on appeal, and so we have no reason to consider this contention.

¶ 23 In this case, there is sufficient evidence in the record to support the trial court's factual findings, and the findings are not against the manifest weight of the evidence. Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.