IN THE COURT OF APPEALS OF IOWA

No. 6-319 / 05-1207
Filed June 28, 2006

CALLAHAN CONSTRUCTION, INC., an Iowa Corporation,
Plaintiff-Appellant,

vs.

GILBERT P. WEIDEMANN, FLORENCE E. WEIDEMANN,
Defendants-Appellees,

GARY MILLER and LARRY MILLER,
Defendants.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

Plaintiff appeals following a district court summary judgment ruling in favor of defendant sellers of certain real property. **AFFIRMED**.

Stephen J. Juergens of Fuerste, Carew, Coyle, Juergens & Sudmeier, P.C., Dubuque, for appellants.

Mark A. Roeder and Stephanie C. Rattenborg of Roeder & Rattenborg, Manchester, for appellees.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Plaintiff Callahan Construction Co., Inc. appeals following a district court summary judgment ruling in favor of defendants Gilbert and Florence Weidemann. We affirm the district court.

I. Background Facts and Proceedings.

The Weidemanns were owners of certain real property located in Dubuque County. In April or May 2004 Joel Callahan, the president of Callahan Construction, and his wife Cindy met with the Weidemanns to discuss purchasing the property. Joel Callahan orally offered to purchase the property for $5000 per acre. The Weidemanns declined.

The Weidemanns contacted John Locher, of the law firm of Locher & Locher, and authorized him to solicit sealed bids for the purchase of the property. Locher assigned this task to another attorney in the firm, George Davis. The sealed bids were received and opened on September 15, 2004. The high bid, which offered $5500 per acre, was on Callahan Construction letterhead and bore the typed signatures of Joel and Cindy Callahan. According to the deposition testimony of George Davis, when he informed Gilbert Weidemann of the high bid Weidemann stated "he was willing to accept the offer and move forward."

Davis stated he telephoned Joel Callahan later that day or the following day and told him the Weidemanns "were willing to accept" the Callahan offer, and that Locher & Locher would proceed to draw up a real estate contract. Davis understood the contract was with either Callahan Construction or Joel and Cindy Callahan individually, and that the terms of the contract "were to be $5,500 a

taxable acre . . . and then we were going to get together with Jennifer Clemens[-Conlon, Joel Callahan's attorney] and Joel to finalize all of the other terms."

However, before any written agreement was executed between the Weidemanns and Callahan Construction or Joel and Cindy Callahan, the Weidemanns sold the land to Gary and Larry Miller for $5800 per acre. Joel Callahan learned of the sale on or sometime after September 22. On September 24, Clemens-Conlon sent Davis a faxed message stating that a binding contract existed between the Weidemanns and Callahan Construction, and requesting confirmation that the Weidemanns would proceed to close the transaction. Davis did not respond to this request, or a subsequent request made by attorney Stephen Juergens on behalf of Callahan Construction.

In October 2004 Callahan Construction filed suit, seeking "declaratory and other relief" against the Weidemanns. Callahan Construction requested the court to declare and establish its rights under an alleged oral real estate contract between itself and the Weidemanns, order specific performance of the contract, nullify and enjoin any contract between the Weidemanns and the Millers, and award it damages.[1] In their answer the Weidemanns denied the existence of an oral contract between themselves and Callahan Construction and asserted as an affirmative defense that, pursuant to Iowa Code section 622.32(3) (2003), Iowa's statute of frauds, there was no competent evidence of the alleged contract.

[1] The petition also alleged the Millers intentionally interfered with the contract between Callahan Construction and the Weidemanns, and requested compensatory and punitive damages. The Millers filed counterclaims alleging intentional interference with contract and abuse of process. Based upon the record before us these claims are currently pending before the district court. They are not at issue in this appeal.

The Weidemanns moved for summary judgment, seeking dismissal of Callahan Construction's claim. The Weidemanns noted there was never a written agreement to sell the land to Callahan Construction, and that section 622.32(3) limited admissible evidence of a contract for the sale of land to writings signed by the party against whom enforcement is sought. Callahan Construction filed a resistance and counter-motion for summary judgment, asserting the agreement between itself and the Weidemanns fell within two exceptions to the statute of frauds. It contended section 622.35, which allows an unwritten contract to be proven through the oral evidence of an adverse party, also allowed proof through the testimonial statements of an adverse party's agent, and thus the contract could be proven through Davis's testimony. It further contended the doctrine of promissory estoppel was available to remove the contract from the statute, and that it had shown the necessary elements of the doctrine.

Following hearing, the district court entered summary judgment in favor of the Weidemanns. The court concluded the exception in section 633.35 had no application in this case, and that the actions Callahan Construction had taken "in reliance upon the oral contract viewed in their best possible light, were not, as a matter of law, sufficient to" remove the contract from the statute of frauds under the promissory estoppel exception. The court accordingly concluded "that the statute of frauds makes incompetent any evidence of the alleged oral contracts" between Callahan Construction and the Weidemanns.

Callahan Construction appeals, asserting the district court erred in holding that the evidence of an oral agreement was incompetent. It asserts Davis's deposition testimony falls within the exception of section 622.35, and moreover

that it established at least a disputed issue of material fact regarding whether the promissory estoppel exception to the statute of frauds applied.[2]

II. Scope and Standards of Review.

We review the district court's summary judgment ruling for the correction of errors at law. Iowa R. App. P. 6.4; *Grinnell Mut. Reins. Co. v. Jungling*, 654 N.W.2d 530, 535 (Iowa 2002). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Grinnell Mut. Reins. Co*., 654 N.W.2d at 535. However, when a motion for summary judgment is made and supported as provided in rule 1.981 a party resisting summary judgment may not simply rely upon the pleadings; he or she must "set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered." Iowa R. Civ. P. 1.981(5). Although summary judgment is improper where reasonable minds could differ on resolution of the matter before the court, *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996), no fact issue exists if the dispute is over legal consequences flowing from undisputed facts. *City of West Branch v. Miller*, 546 N.W.2d 598, 600 (Iowa 1996).

III. Statute of Frauds.

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[2] Callahan Construction also addresses additional contentions raised by the Weidemanns in their summary judgment motion, including claims that the alleged oral agreement was indefinite or left terms open for negotiation, that Davis lacked either actual or apparent authority to contract on their behalf, and that the parties did not intend there to be a contract until it was reduced to writing. Our resolution of the statute of frauds issue renders discussion of these contentions unnecessary.

Pursuant to section 622.32(3), evidence of a contract for the purchase of land is inadmissible unless it is "in writing and signed by the party" against whom enforcement is sought. *See also Pollmann v. Belle Plaine Livestock Auction, Inc*., 567 N.W.2d 405, 407 (Iowa 1997) (noting the statute "does not void such oral contracts" but "makes oral proof of them incompetent"). Clearly, such written and signed evidence does not exist here. There are, however, exceptions that will remove an oral real estate contract from the statute of frauds. Callahan Construction relies upon two: section 622.35 and promissory estoppel.

A. Section 622.35. Section 622.35 provides that "[t]he oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same." The exception may be satisfied by either an explicit admission or testimonial statements from which a fact finder could conclude that an unwritten agreement exists. *See Gardner v. Gardner*, 454 N.W.2d 361, 364 (Iowa 1990); *Packwood Elevator Co. v. Heisdorffer,* 260 N.W.2d 543, 546 (Iowa 1977); *Davis v. Roberts*, 563 N.W.2d 16, 20-21 (Iowa Ct. App. 1997). Here, however, the alleged makers of the unwritten contract—the Weidemanns—have denied the existence of an oral agreement and have not made any statements from which its existence could be reasonably inferred.

Callahan Construction seeks to circumvent the Weidemanns' denial through the deposition testimony of their attorney, George Davis. It contends that section 622.35 allows proof of an unwritten agreement through judicial admissions of not only the maker but the maker's agent, that Davis was the Weidemanns' agent in this matter, and accordingly Davis's testimony is competent evidence of the existence of an oral contract. We cannot agree.

Iowa law has long recognized that, “where the other party relies upon the testimony of the maker, the contract must be established through his testimony alone, and that same cannot be contradicted or supplemented by other evidence.” *Elliott v. Loucks*, 194 Iowa 64, 68, 187 N.W. 689, 690 (1922); *see also McCutchan v. Iowa State Bank of Fort Madison*, 232 Iowa 550, 554, 5 N.W.2d 813, 815-16 (1942). Although parties have been allowed to prove an admission by the maker through the testimony of the maker’s agent, such cases are limited to those involving corporations and companies which can act only through their officers and agents. *See Elliott,* 194 Iowa at 69, 187 N.W. at 691; *see also McCutchan*, 232 Iowa at 554, 5 N.W.2d at 815. “[T]o deny the right of the party relying on the testimony” in such cases “would be to deny application of the statue to corporations.” *Elliott*, 194 Iowa at 69, 187 N.W. at 691. However, “[t]o extend the rule so as to permit the examination of the agent in every transaction in which the business of the principal was conducted thereby would seriously impair the statute, and open the way to accomplish the very things that the statute of frauds was designed to prevent.” *Id*. (concluding testimony of individual lessor’s agent was inadmissible).

Callahan Construction urges us to carve out an exception for attorney agents, given the special nature of the attorney-client relationship. It points out that an attorney is presumed to act with authority, and has the power to "[b]ind a client to any agreement, in respect to any proceeding within the scope of the attorney's or counselor's proper duties and powers . . . ." *Gilbride v. Trunnelle*, 620 N.W.2d 244, 251 (Iowa 2000) (citation omitted). However, an attorney’s

authority to act on behalf of a client is a question separate from, and secondary to, the question of whether his judicial admissions fall within section 622.35.

Callahan Construction also points out that the purpose of the statute of frauds is to defeat fraud and perjury and protect innocent parties from the consequences thereof. *See Fairall v. Arnold*, 226 Iowa 977, 988, 285 N.W. 664, 670 (1939); *Leytham v. McHenry*, 209 Iowa 692, 695, 228 N.W. 639, 640 (1930). It asserts this purpose would not be frustrated by the use of statements given, under oath, by the alleged makers' attorney. While this position has a certain logical appeal, it nevertheless requires us to apply a meaning to the statutory exception that is contrary to the clear and express language limiting it to the judicial admissions of the alleged maker. *See State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003) ("We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning is clear.").

Here, the Weidemanns have neither admitted to an oral contract nor made testimonial statements from which a fact finder could conclude that such a contract exists. Accordingly, the exception of section 622.35 does not apply.

B. Promissory Estoppel. The doctrine of promissory estoppel, if satisfied, will also remove a contract from the statute of frauds. *See* Iowa Code § 622.33; *Kolkman v. Roth*, 656 N.W.2d 148, 152 (Iowa 2003). It is applied "to circumvent the statute when necessary to prevent an injustice," and requires strict proof of four elements:

> (1) a clear and definite promise; (2) the promise was made with the promissor's clear understanding that the promisee was seeking assurance upon which the promisee could rely and without which he would not act; (3) the promisee acted to his or her substantial detriment in reasonable reliance on the promise; and (4) injustice can be avoided only by enforcement of the promise.

Kolkman, 656 N.W.2d at 156 (citation omitted). Like the district court, we focus on the third element—whether Callahan Construction acted to its substantial detriment in reasonable reliance on the alleged oral contract.

Callahan Construction asserts that in reliance on the alleged agreement it "hired legal counsel and incurred legal expenses, *inter alia*, to confer and work with Weidemann's attorney George Davis [and] review documents, . . . arranged bank financing, . . . and began marketing lots in the future development . . . ." However, a review of Joel Callahan's deposition testimony reveals that no steps have been taken toward future development of the property and that Callahan Construction has expended no funds in reliance on the alleged agreement other than an unspecified amount billed by Clemens-Conlon for legal services she performed over an approximate one-week period in September 2004. While Joel Callahan testified that he thought he had met with a representative of his bank, no formal application had been submitted nor had a letter of commitment been issued. Moreover, the "marketing" relied on by Callahan Construction appears to be limited to an oral announcement of the pending purchase, after which some individuals expressed an interest in acquiring a lot in the future development.

We agree with the district court that the foregoing is insufficient to create a disputed issue of material fact regarding the existence of the substantial detrimental reliance necessary to satisfy the promissory estoppel doctrine. Moreover, incurring an undisclosed amount of attorney fees for what appears to be a limited amount of term negotiation and document review is not tantamount to an injustice that requires enforcement of an unwritten contract, should one exist. *See Kolkman*, 656 N.W.2d at 156, n.4 (noting promissory estoppel

"requires strict proof that the reliance inflicted injustice that requires enforcement of the promise," including consideration of "the availability and adequacy of other remedies, particularly cancellation and restitution" and "the definite and substantial character of the action or forbearance in relation to the remedy sought").

IV. Conclusion.

Based upon the summary judgment record, no material and disputed facts have been presented that would be sufficient to bring Callahan Construction's claim within either the judicial admission or promissory estoppel exceptions to the statute of frauds. Because Callahan Construction can offer only oral evidence of the alleged agreement between itself and the Weidemanns, its claim must fail. The district court accordingly did not err in granting the Weidemanns summary judgment and dismissing Callahan Construction's claim.

AFFIRMED.