Affirmed and Opinion filed March 9, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00079-CV

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NATIONAL FLORAL SERVICE, INC., Appellant

V.

WEINGARTEN REALTY INVESTORS, Appellee

On Appeal from the 295th District Court
Harris County, Texas
Trial Court Cause No. 97-43452

O P I N I O N

National Floral Service, Inc., appeals from a summary judgment granted Weingarten Realty Investors in its suit alleging breach of contract. Because we find that National's lease-based claim is barred by the statute of frauds and that it has waived any claim for reimbursement of capital expenditures, we affirm the trial court's judgment.

I. Background

National, the operator of a floral shop, entered into a lease with Weingarten on January 28, 1982, that was extended at least twice and was scheduled to expire on June 30, 1994. In early 1993,

approximately a year before the lease's scheduled expiration, Weingarten requested National make certain repairs to the property pursuant to the lease. National Chief Executive Officer Fred Massey alleges that soon thereafter he met with Weingarten representative Scott Luther to discuss extending the lease beyond its scheduled expiration. Massey informed Luther that National would agree to extend the lease only if National were allowed to make certain capital improvements to the property and only if Weingarten were to reimburse National for the improvements. Massey alleges that Luther subsequently told him that Weingarten officials had approved a five-year extension with the agreed-upon rent schedule and that Weingarten had agreed to reimburse National up to $7,000 for the requested improvements. Massey advised Luther that National agreed to the terms. A few weeks later, on August 23, 1993, Weingarten delivered to National a renewal letter for execution. The cover letter provided, in part, as follows:

> Enclosed are four (4) execution copies of a Renewal Letter extending the term of the captioned Lease Contract.
>
> If this instrument is in acceptable form, please sign all copies and return them in the envelope provided. After execution by Landlord [Weingarten], one (1) fully executed copy will be returned to you for your records.
>
> Should you have any questions or comments, please feel free to call.
>
> WEINGARTEN REALTY INVESTORS
>
> By: Weingarten Really Management Company
> By: (signed)
> Kim Ibarra
> Legal Department

Attached was the three-page renewal letter, with signature lines for National's president and for Weingarten's president. The summary judgment record contains a copy signed by National but not a copy signed by Weingarten. National does not allege that Weingarten signed the renewal letter. The extension called for an increase in rent to $2,859 per month, up from $2,526.67 under the previous extension, for the period from July 1, 1994, through June 30, 1995. In addition, the extension provided that Weingarten

agreed to reimburse National up to $7,000 for the capital improvements. The renewal letter further provided that the agreement would extend the lease through June 30, 1999, "when executed by the parties." Massey alleges that he mailed the executed renewal letter to Weingarten but never received a copy signed by Weingarten. Weingarten alleges that it never received the agreement signed by National. Massey also alleges that National made the capital improvements.

About a year later, after the renewal letter was to have taken effect, National sent Weingarten a check dated July 12, 1994, for $2,859, the increased monthly rent under the renewal letter. By letter dated July 29, 1994, however, Weingarten informed National that the lease had terminated on June 30, 1994, and that Weingarten deemed that National was occupying the premises on a month-to-month basis. In that letter, Weingarten informed National that it was terminating the month-to-month tenancy effective midnight August 31, 1994. On August 17, 1994, Weingarten tendered to National a check for $332.33, the difference between the rent under the previous extension and the rent under the unexecuted renewal letter. Weingarten called the payment a reimbursement of overpayment of the July 1994 rent. Weingarten subsequently filed suit to evict National from the premises, which Weingarten ultimately leased to a restaurant chain. National argues that after Weingarten sued for eviction, the florist was forced to move to an unsatisfactory location, where the business ultimately failed.

On August 19, 1997, Weingarten sued National for rent unpaid during the eviction process. National answered and filed a counterclaim for wrongful eviction, breach of contract, violations of the Deceptive Trade Practices Act, fraud, and the damages resulting from the loss of the floral business. Weingarten moved for partial summary judgment. The trial court first granted partial summary judgment as to the recovery of lost net profits. The court later granted partial summary judgment as to all of National's claims, without specifying upon which grounds it relied. The partial summary judgment became final when Weingarten nonsuited its remaining causes of action against National.

II. Discussion

National advances one global issue in which it argues that the trial court erred in granting summary judgment to Weingarten. National also lists twelve specific subissues in support of its global issue. In its

first specific issue, National argues that the trial court erred because there was a genuine issue of material fact as to whether the statute of frauds had been satisfied.

A. Standard of Review

Upon appellate review, the movant has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *See Nixon v. Mr. Property Management*, 690 S.W.2d 546, 548-49 (Tex. 1985). In reviewing the summary judgment proof, we will take as true proof favoring the nonmovant and will indulge every reasonable inference and resolve any doubts in favor of the nonmovant. *See id.* A trial court should grant a defendant's summary judgment motion if the defendant disproves at least one essential element of the plaintiff's cause of action or establishes all the elements of its affirmative defense as a matter of law. *See id.*

Evidence favorable to the movant's position will rarely be considered unless it is uncontroverted. *See Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply*, 391 S.W.2d 41, 47 (Tex. 1965). A motion for summary judgment must expressly present the grounds upon which it is made, and it must stand or fall on these grounds alone. *See* TEX. R. CIV. P. 166a(c); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). Issues not expressly presented to the trial court by written motion or response to the motion for summary judgment cannot be considered on appeal as grounds for reversal. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1983). When a trial court's order granting summary judgment does not specify the ground relied upon for its ruling, we will affirm the judgment if any of the theories advanced is meritorious. *See Evans v. First Nat'l Bank of Bellville*, 946 S.W.2d 367, 377 (Tex. App.–Houston [14th Dist.] 1997, writ denied).

B. Statue of Frauds

An agreement to lease real estate for a term longer than one year is not enforceable unless the agreement is signed by the party sought to be charged with the agreement. *See* TEX. BUS. & COM. CODE ANN. § 26.01(a)(2), (b)(5) (Vernon 1987) (statute of frauds); TEX. PROP. CODE ANN. § 5.021 (Vernon 1983). The material modification of a lease falling within the statute of frauds also must be in writing and signed by the party sought to be charged with the modification. *See Lone Star Steel Co. v. Reeder*, 407 S.W.2d 28, 31 (Tex. Civ. App.–Texarkana 1966, writ ref'd n.r.e.).

The lease extension at issue, purporting to run from July 1, 1994, to June 30, 1999, was for a period of five years. It falls within the statute of frauds. The summary judgment proof also shows that although National signed the extension, Weingarten did not. Such lease for a term longer than one year must be signed by the party sought to be charged with the agreement. The extension is not so signed and is not enforceable against Weingarten.

National argues that the cover letter, when combined with the unsigned renewal letter, constitutes sufficient proof of a legal memorandum to satisfy the statute of frauds. *See Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978) (to satisfy statute of frauds, there must be written memorandum, complete within itself in every material detail, and which contains all essential elements of agreement, so that contract can be ascertained from writings without resorting to oral testimony); *Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995) (written memorandum need not be contained in one document). Such a memorandum must be signed by the party sought to be charged. *See Adams v. Abbot*, 254 S.W.2d 78, 80 (Tex. 1952). National argues that a material fact issue remains as to whether Kim Ibarra, the individual signing the cover letter, had the authority to bind Weingarten and that the cover letter could help constitute a writing signed by the party sought to be charged.

The cover letter is the only document signed by anyone at Weingarten. Ibarra is identified as being with the legal department, but is not otherwise identified as an attorney, a secretary, or a paralegal. The language of the cover letter itself provides that after National signs the renewal letter, the copies were to be returned to Weingarten for execution. This suggests that the renewal letter is made effective by the signing of both parties, not merely the signing by National. The renewal letter itself said it would become effective "when executed by both parties."

The cover letter and the renewal letter combined do not constitute a sufficient memorandum of agreement sufficient to satisfy the statute of frauds. The plain language of both the cover letter and the renewal letter contemplates that both parties must sign the renewal letter before the renewal letter became effective. The trial court did not err if it granted summary judgment on grounds that the lease was unenforceable under the statute of frauds. We overrule National's first issue.

C. Partial Performance

In its second issue, National argues that even if the combined documents do not satisfy the statute of frauds, the trial court erred in granting summary judgment because National had established partial performance, which removes the lease from the statute of frauds.

An oral agreement for a letting of real estate for a greater period than one year may be taken out of the operation of the statute of frauds by such part performance as, on principles of equity, entitles the lessee to specific performance. *See Anderson v. Anderson*, 13 Tex. Civ. App. 527, 529, 36 S.W. 816, 817 (1896). In the context of an oral lease, an exception to the applicability of the statute of frauds can exist if each of the following elements are met: (1) payment of consideration; (2) possession of the leased premises by lessee; and (3) the lessee makes valuable improvements. *See King v. Brevard*, 378 S.W.2d 681, 684 (Tex. Civ. App.–Austin 1964, writ ref'd n.r.e.). Equity may enforce an otherwise unenforceable oral agreement when nonenforcement of the agreement would itself amount to a fraud. *See Dodson v. Kung*, 717 S.W.2d 385, 388 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

National argues that partial performance took the lease out of the statute because National possessed the property, paid considerations, in the form of the July 1994 rent, and made valuable improvements.

As to the July 1994 rent, National argues that Weingarten's accepted, endorsed and deposited the check, and that such actions constituted partial performance in the form of payment of consideration. The summary judgment proof shows, however, that approximately five weeks after Weingarten deposited the check, it rebated to National the excess, calling the payment a return of overpayment. Although Weingarten did endorse and deposit the check, such check-related actions in a business often are handled automatically by office personnel separate and apart from business decisions regarding the execution of lease agreements. We have not found a Texas case in which a court has held the endorsement and deposit of a check by the payee is sufficient to take a multiyear lease out of the statute of frauds when the payor seeks to avoid the statute. All three elements must be met to take the oral agreement out of the statute of frauds. Here, the payment of the rent was recouped and, hence, no consideration paid. The lack of consideration is sufficient in itself to negate National's partial performance argument.

Nevertheless, National further argues that it made valuable improvements, and that such improvements took the agreement out of the statute. National failed to advance this argument to the trial court. We cannot consider it on appeal as grounds for reversal. *See McConnell*, 858 S.W.2d at 341. Such claim arguably is recoverable in an action in the nature of quantum meruit or partial performance as to the reimbursement claim. On appeal, however, National fails to present an issue seeking recovery of the $7,000 on grounds of quantum meruit or partial performance. It advances its capital expenditure argument only in an attempt to take the lease out of the stature of frauds. By failing to raise the issue, National has waived any claim. *See* TEX. R. APP. P. 38.1(h); *Maranatha Temple, Inc. v. Enterprise Prods. Co.*, 893 S.W.2d 92, 105-06 (Tex. App.–Houston [1st Dist.] 1994, writ denied). We overrule National's second issue.

D. Promissory estoppel

In its third issue, National argues that summary judgment was improper because promissory estoppel removed the contract from the statute of frauds.

For promissory estoppel to create an exception to the statute of frauds, there must have been a promise to sign a written contract that had been prepared and that would satisfy the requirements of the statute of frauds. *See Nagel v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982). Courts will enforce an oral promise to sign an instrument complying with the statute of frauds if (1) the promisor should have expected that his promise would lead the promisee to some definite and substantial injury; (2) such an injury occurred; and (3) the court must enforce the promise to avoid injustice. *See id.* (citing *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1973)). It is the promise to sign a written agreement or enter into written agreement that is determinative. *See Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 769 (5th Cir. 1988); *"Moore" Burger*, 492 S.W.2d at 938, 940. Promissory estoppel sufficient to remove a contract from the statute of frauds requires that the promisor agree to sign a document that had already been prepared or "whose wording had been agreed upon" that would satisfy the statute of frauds. *See Southmark Corp.*, 851 F.2d 763 at 766. A promise to prepare a written contract is not sufficient. *See Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739, 741 (Tex. App.–Houston [14th Dist.] 1992, writ denied).

Massey alleges only that Weingarten representative Luther told him that he, Luther, had "obtained approval" from Weingarten officials to extend the lease with an agreed rent schedule and reimbursement agreement. Massey does not specifically allege that anyone at Weingarten promised to sign a preexisting writing. Indeed, he does not allege that such a writing existed at the time of the purported promise. Nor do we see in the cover letter a promise to sign the renewal letter. The cover letter provided that a copy would be returned after execution. Moreover, when National received the renewal letter, the renewal letter plainly stated it would become effective upon execution by both parties. When a party relies on a memorandum of agreement in asserting a promissory estoppel exception to the statute of frauds, that party may not disregard unfavorable provisions in the memorandum agreement. *See Coastal Corp. v. Atlantic Richfield Co.*, 852 S.W.2d 714, 717 (Tex. App.–Corpus Christi 1993, no writ) (citing *Hall v. Hall*, 158 Tex. 95, 102, 308 S.W.2d 12, 17 (1957)). National signified its agreement with this term by signing the renewal letter. We do not find in Weingarten's actions a promise to sign a writing that either was in existence or whose wording had been agreed upon.

As with its partial performance argument, National does not argue that its capital expenditures are recoverable under promissory estoppel. It advances its estoppel argument only to satisfy the statute of frauds with regard to the five-year lease extension. It has waived any claim for reimbursement of capital expenditures. *See* TEX. R. APP. P. 38.1(h); *Maranatha Temple*, 893 S.W.2d at 105-06. We overrule National's third issue.

E. Other Issues

In its fourth and fifth issues, National argues that Weingarten has a valid contract because it accepted the benefits of the contract and that under the mailbox rule, National established a valid contract when mailed the signed renewal letter. The acceptance-of-benefits argument resembles National's unsuccessful partial performance argument. This argument, too, fails. Additionally, we have found no authority suggesting that the mailbox rule will take the contract out of the statute of frauds. We overrule National's fourth and fifth issues.

In its sixth and seventh issues, National argues that the trial court erred in granting judgment because National raises a fact issue about whether all conditions precedent had been met or whether

Weingarten had waived any conditions precedent. The condition precedent ground is a defense relied upon by Weingarten; waiver is a ground relied upon by National to negate Weingarten's defense. Because the statute of frauds issue will support the summary judgment, the trial court need not have addressed Weingarten's condition precedent defense or National's assertion of waiver. We overrule National's sixth and seventh grounds.

In its eleventh issue, National complains the trial court erred in granting judgment on grounds that lost profits were consequential damages not recoverable under the terms of the lease. The trial court could have granted summary judgment to Weingarten without relying upon National's alleged contractual waiver of consequential damages. We overrule National's eleventh issue.

F. Other Claims and Complaints

In its eighth issue, National contends that the trial court erred in granting judgment to Weingarten because the statute of frauds does not extinguish National's fraud claim. Weingarten moved for summary judgment, in part, on grounds that such claim is subsumed by National's contract claim. On appeal, National does not attack this ground. *See Evans*, 946 S.W.2d at 377. We overrule this issue.

In National's ninth issue, it complains that the trial court erred in granting judgment because there is a genuine issue of material fact regarding National's being wrongfully evicted. An action for wrongful eviction requires a valid unexpired lease. *See McKenzie v. Carte*, 385 S.W.2d 520, 528 (Tex. Civ. App.–Corpus Christi 1964, writ ref'd n.r.e.). Here, there being no such lease, National's claim fails as a matter of law. We overrule its ninth issue.

In its tenth issue, National claims the trial court erred in granting summary judgment on its claims under the Deceptive Trade Practices Act. Breach of contract allegations will not support a DTPA claim. *See Ashford Dev., Inc. v. US Life Real Estate Servs. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983). Where a defendant's alleged misrepresentations concern the defendant's failure to fulfill its contractual duties, such alleged failure to later perform the duties does not constitute a misrepresentation under the DTPA. *See Crawford v. Ace Sign*, Inc., 917 S.W.2d 12, 14 (Tex. 1996). The duties sought to be enforced were established by contract. National alleges no misrepresentation apart from the failure to fulfill contracts. We overrule its tenth issue.

In its twelfth issue, National complains that the trial court erred in denying its objections to certain summary judgment proof. National waived any complaint by failing to get the court's ruling signed and made a part of the record. *See Cain v. Rust Indus. Cleaning Servs., Inc.*, 969 S.W.2d 464, 466 (Tex. App.–Texarkana 1998, writ denied). We overrule its twelfth issue.

III. Conclusion

Having found that the statute of frauds bars enforcement of the lease extension and that National has waived any claim for reimbursement of capital expenditures, we affirm the trial court's judgment.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed March 9, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).