

IN THE COURT OF APPEALS 12/29/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00606 COA

SID DAVIS

APPELLANT

v.

NICK KOLINSKY AND 7-K CORP. D/B/A THE WILD MAGNOLIA

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. HOWARD L. PATTERSON, JR.

COURT FROM WHICH APPEALED: FORREST COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JAY L. JERNIGAN

ATTORNEY FOR APPELLEE:

S. CHRISTOPHER FARRIS

NATURE OF THE CASE: BREACH OF CONTRACT

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT GRANTED TO DEFENDANT

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

SOUTHWICK, J., FOR THE COURT:

Nick Kolinsky and 7-K Corporation, collectively "7-K", were granted summary judgment in Sid

Davis' action against them for breach of an oral employment contract. Davis contends that the trial court erred in granting summary judgment by applying the Statute of Frauds. He also argues that the trial court was precluded from granting summary judgment on claims sounding under the doctrine of unjust enrichment. We affirm in part, but reverse on one part of Davis' claim.

FACTS

On June 21, 1993, Davis filed a complaint for specific performance of an employment contract arising from services he provided to 7-K in its efforts to open a restaurant. Specifically, Davis alleged that on February 1, 1992, he and 7-K agreed that he would assist in getting the restaurant ready for business in exchange for twenty-five percent of the business' profits and a management fee. Davis worked with the owners and other employees to prepare an existing building until May 27, 1992, but because of differences with the owners he argues his quitting on that date was in fact a constructive termination. The restaurant had not yet opened. Davis alleged that he was entitled to a percentage of the profits and a sum of money in addition as *quantum meruit* compensation for the services he had already provided.

7-K answered with a general denial and alleged that the complaint was barred by the statutes of limitations and frauds. It filed a motion to dismiss based upon this position. 7-K argued that, at the latest, Davis' cause of action accrued on May 27, 1992, when he quit his employment with 7-K. 7-K agreed that Davis would have been entitled to consideration for a bonus at the end of 1992, but because he quit their employ even before the restaurant opened in May 1992, that right to a bonus also terminated. Their affidavits assert that Davis was an employee and never had any other status. The trial court granted summary judgment to 7-K based upon both statute of limitations and the Statute of Frauds.

DISCUSSION

At the outset, it is appropriate to explain this court's applicable standard of review. We review *de novo* the granting of summary judgment by the trial court. In doing so, we recognize that a motion for summary judgment should be granted only where there is no genuine issue of material fact. It is not a substitute for a trial of disputed issues. *Brown v. Credit Ctr.*, 444 So. 2d 358, 362 (Miss. 1983). All evidence presented must be viewed in the light most favorable to Davis, the opponent to the motion. *Id.* On the other hand, no party is entitled to rely as evidence on unsworn assertions in pleadings, but must submit affidavits or other similar evidence in support of its position. M.R.C.P. 56(e).

1. Statute of Frauds

7-K contends that since Davis alleged that his employment contract entitled him to receive profits for 1992 "and in the future," he necessarily conceded that the contract would continue for a period in excess of fifteen months. If the contract gave him a permanent or at least multiple-year right to share in profits even though he was no longer employed by 7-K, then the Statute of Frauds would require the contract to be in writing. Miss. Code Ann. § 15-3-1(d) (1972). After the Statute of Frauds defense was raised and the trial court apparently granted a motion to dismiss, though no such order dismissing appears, Davis amended his complaint. This time the bare mention of *quantum meruit* that appeared in the original complaint is fleshed out, and other changes are made. The same outline of

the agreement remained, however. Davis alleges that 7-K agreed that in return for the work he was to perform, he was to receive "twenty-five percent of the profits from the business and be a part-owner of the business." He asks the court to award "and continue to award" twenty-five percent of the profits.

As an example of artful pleading, Davis no longer clearly ties the continuation of his right to share in profits to the agreement with 7-K. Exactly where the contract rights end and other measures of damages begin is unclear, but the allegation appears to be that the permanent right to profits is the proper measure under *quantum meruit* to compensate him for what he did from February to May, 1992, and to prevent unjust enrichment.

For purposes of analysis under the Statute of Frauds, we must consider whether the claimed agreement was *capable* of performance within fifteen months. *Beane v. Bowden*, 399 So. 2d 1358, 1361 (Miss. 1981). The assumptions of the parties on the likely length are irrelevant. The defendant, 7-K, does not allege Davis had to remain at work for more than fifteen months in order to receive a bonus, much less his salary. Under 7-K's explanation of the agreement the contract could be performed within fifteen months and the Statute of Frauds would not apply. Davis in the Amended Complaint blurs what he alleges is his entitlement from the oral contract and what is *quantum meruit*. A fair reading of Davis's claim is that the contract provided him twenty-five percent of 1992 profits for the work he was to do that year and that his termination, voluntary or forced, did not end that contract right. Thus a share in 1992 profits would be a contract entitlement, and a continuing share in profits after 1992 was an equitable measure of damages for wrongful termination to prevent 7-K from being unjustly enriched for all Davis did in the spring of 1992.

The trial court found the Statute of Frauds to bar this suit. The ruling was correct as to the claims raised in the original complaint, but incorrect under the amended complaint, as neither party any longer was alleging a long-term *contractual* right to profits. Without that provision, the contract was capable of being performed within fifteen months.

2. Statute of Limitations

The Mississippi Code proscribes actions on unwritten employment contracts initiated more than one year after the contract claim accrued. Miss. Code Ann. § 51-1-29 (1972). Thus, the question for the trial judge was whether the evidence demonstrated that Davis' cause of action accrued before June, 1992.

On most of Davis' claims the effect of this limitation statute is obvious. If Davis was constructively terminated by 7-K, a cause of action for wrongful termination accrued at that time. The unrebutted date for that is May 27, 1992. Suit was filed on June 21, 1993. Thus all claims based on wrongful termination, specific performance, or related rights are time-barred. If Davis wanted a share in future profits because of being wrongfully terminated, he waited too long to sue.

This is a short, legislatively-created statute of limitation. The purpose is to require former employees whose rights can be reconstructed only through testimony and not documents, to move quickly. Davis was not quick enough on matters that arose because of the termination.

A separate question arises from Davis' claim to a bonus at the end of 1992. Even though the statute

of limitations began running on May 27, 1992 for a cause of action based on wrongful termination, Davis is alleging he was still owed money under the contract even after being terminated. Not being paid money owed under the contract would be a separate cause of action, accruing when the payment should have been but was not made. The problem with the claim is the standard problem with suits on oral contracts: there is no written agreement to explain the rights of the parties. Davis' suit presupposes but never specifically alleges that after a termination, and perhaps depending on whether termination was wrongful or not, he would remain entitled to a bonus. However, Davis never presents any proof usable in summary judgment regarding his right under the contract to share in 1992 profits if he is no longer employed by 7-K at the end of that year.

The only sworn evidence on the issue is an affidavit from 7-K that "Davis would draw a salary that would be comparable to what other managers of restaurants in the Hattiesburg area were making. Further, at the end of the year, we would review the profitability of the business and provide Mr. Davis with a bonus based upon the success or failure of the restaurant."

To receive summary judgment, 7-K had to show there was no genuine issue of material fact as to any part of Davis' claims. Neither side presented affidavits that detailed this part of the agreement. Quite possibly no one in contract negotiations ever addressed the point of whether Davis had to finish the year in order to share in profits, or at least be present during part of the time the restaurant was open. Nonetheless, 7-K presented no evidence on the issue. Since it was the moving party, it was not entitled to summary judgment on the question of Davis' receiving a share of profits for 1992. That is because Davis did not have to prove his claim in order to prevent 7-K's summary judgment; 7-K had to show there was no issue of material fact to support the claim. If Davis can prove he was entitled to receive a share of 1992 profits despite his termination, then the cause of action for not being paid that amount is not time-barred. We reverse on this one issue.

2. *Unjust Enrichment*

Davis alleges *quantum meruit* as an additional basis for liability. He seeks a permanent share of profits based on this theory. The problem with the argument is that it invokes an equitable doctrine that applies when there is no enforceable contract, written or oral, and prevents someone without contract obligations from being unjustly enriched by the labor or property of another. *Omnibank v. United So. Bank*, 607 So. 2d 76, 92 (Miss. 1992) (citations omitted). Here there was an enforceable contract. Davis asserts it in his pleadings. 7-K admits there was one, and presents affidavits setting out its terms. Davis gets flexible in his assertions of the contract terms once the Statute of Frauds is raised, but he never denies there was a contract.

Under these agreed facts that prove the existence of a contract, there simply is no application for *quantum meruit*. Davis is limited to showing he is entitled to relief under the contract. *Kalavros v. Deposit Guar. Bank & Trust Co.*, 248 Miss. 107, 120, 158 So. 2d 740, 745-46 (1963).

THE JUDGMENT OF THE CHANCERY COURT OF FORREST COUNTY IS AFFIRMED AS TO WRONGFUL TERMINATION. THE JUDGMENT IS REVERSED AS TO THE STATUTE OF FRAUDS AND THE POSSIBLE RIGHT TO A SHARE OF 1992 PROFITS. THIS CAUSE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE APPELLANT AND TO THE APPELLEE.

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING,
McMILLIN, AND PAYNE, JJ., CONCUR.**