Affirmed and Opinion filed May 11, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00169-CV

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DOUGLAS WOHLFAHRT AND LYNN WOHLFAHRT, Appellants

V.

PATRICK BAAS AND MARIA BAAS, Appellees

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 97-49009A

O P I N I O N

Douglas Wohlfahrt and Lynn Wohlfahrt appeal from a summary judgment granted Patrick Baas and Maria Baas in the Wohlfahrt's contract-based suit. Because the sales contract falls within the statute of frauds and the lease was properly terminated, we affirm.

I. Background

On August 29, 1996, the Wohlfahrts entered into an earnest money contract and residential lease agreement with the Baases for a house in Richmond. Under the lease

purchase agreement, the appellants had three months in which to purchase the house, applying the rent to the purchase price. The parties subsequently extended the closing deadline through February 28, 1997. The Wohlfahrts presented evidence that the parties agreed to a second extension, through April 15, 1997. There is no evidence that the Baases signed a second purchase contract extension, pushing the deadline for closing until April 15, 1997. The parties dispute whether the Baases properly terminated the lease. The Wohlfahrts, nevertheless, vacated the premises in April 1997 after the Baases filed a forcible detainer action.

The Wohlfahrts filed suit against the Baases and against Wayne Murray Realtors for breach of the earnest money contract, breach of the lease, and malicious prosecution. The Baases moved for summary judgment on grounds that there was no evidence of a breach of an enforceable earnest money contract and statute of frauds; as a matter of law the Baases complied with the lease agreement; and there was no evidence of malicious prosecution of the forcible detainer action. The trial court granted the Baases' motion and severed the causes to make the order appealable. The Wohlfahrts do not raise an issue of malicious prosecution on appeal and thus waive it. *See* TEX. R. APP. P. 34.1(e); *Perry v. Brooks*, 808 S.W.2d 227, 229-30 (Tex. App.–Houston [14th Dist.] 1991, no writ).

II. Discussion

A. Sales Agreement

The Wohlfahrts argue the trial court erred in granting summary judgment to the Baases on the earnest money contract. When we review a grant of summary judgment, the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law; in deciding whether there is a disputed material fact issue precluding summary judgment, we take as true evidence favorable to the nonmovant and indulge every reasonable inference and resolve any doubt in the nonmovant's favor. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). A trial court should grant a defendant's motion for summary judgment if the defendant establishes all the elements of an

affirmative defense as a matter of law. *See id.* The statute of frauds is an affirmative defense. *See Gerstacker v. Blum Consulting Eng'rs, Inc.*, 884 S.W.2d 845, 849 (Tex. App.–Dallas 1994, writ denied). To be enforceable, a contract for the sale of land must comply with the statute of frauds. *See* TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987); *Lewis v. Adams*, 979 S.W.2d 831, 833 (Tex. App.–Houston [14th Dist.] 1998, no pet.). The agreement must be in writing and signed by the party sought to be charged. See § 26.01(a); *Lewis*, 979 S.W.2d at 833.

The earnest money contract is a contract for the sale of real estate, required to be in writing to be enforceable. Under the terms of the contract, the Wohlfahrts were to close on or before November 29, 1996. The parties by written agreement extended the deadline at least once, to February 28, 1997. Although the Wohlfahrts allege that the parties agreed to a second extension, to April 15, 1997, the record contains no such extension agreement signed by the party sought to be charged.

The Wohlfahrts also argue that the agreement to extend closing falls under an equitable exception to the statute of frauds. To meet this exception the party seeking relief must show the purchaser (1) paid consideration, (2) took possession of the property, and (3) made permanent and valuable improvements to the property. *See Sharp v. Stacy*, 535 S.W.2d 345, 347 (Tex. 1976). All three elements must exist. *See Hooks v. Bridgewater*, 111 Tex. 122, 127, 229 S.W. 1114, 1116 (1921). Here, the Wohlfahrts offer no evidence of permanent and valuable improvements to the property. Moreover, there is no evidence of consideration. Although, they did make rental payments under the contract, which were to be applied to the purchase price, such payments were required independently under the contract and as such were not unequivocally referable to any such oral agreement or corroborative of the fact that a contract was actually made. *See Wiley v Bertelsen*, 770 S.W.2d 878, 882 (Tex. App.–Texarkana 1989, no writ) (citing *Chevalier v. Lane's, Inc.*, 147 Tex. 106, 213 S.W.2d 530 (1948)). The contract does not fall under the equitable exception to the statute of frauds.

The Wohlfahrts also complain that parties to a contract required to be in writing may agree orally to extend the time of performance of a contract, so long as the oral agreement is made before the expiration of the written contract. *See Dracopoulas v. Rachal*, 411 S.W.2d 719, 721 (Tex. 1967). The Wohlfahrts raised the issue for the first time in their motion for a new trial. The issue was not considered by the trial court in granting summary judgment. We may not consider the issue on appeal as grounds for reversal. *See* TEX. R. CIV. P. 166a(c); *Kelly-Coppedge, Inc. v. Highlands, Inc. Co.*, 980 S.W.2d 462, 467 (Tex. 1998).

Any purported sales contract extension, not being in writing signed by the party sought to be charged, is not enforceable under the statute of frauds. The trial court did not err in granting summary judgment on this ground.

B. Lease

The Baases moved for summary judgment on grounds that the Wohlfahrts as a matter of law had breached the lease agreement and that the Baases had properly moved to terminate the lease and the Wohlfahrts' right to occupy the property. We construe the Wohlfahrts' complaint as an argument that the Baases did not show themselves entitled to judgment on the lease as a matter of law.

Taking the facts in the light most favorable to the Wohlfahrts, the written lease ran through November 30, 1996, after which date the Wohlfahrts became month-to-month tenants.

The lease provided, in part, as follows:

> If this Lease is automatically renewed on a month-to-month basis either party may terminate the renewal of this Lease by providing written notice to the other party and the renewal of this Lease will terminate:
>
> > (i) on the last day of the month in which the notice is given if notice is given on the first day of the month. If the notice is given on a day other than the first day of the month, the renewal of this Lease will terminate on the last day of the month following the month in which notice is given.

There is evidence that the Baases gave notice that the lease would terminate on March 31, 1997, by letter dated February 28, 1997, return receipt requested. The letter carrier, after attempting to make delivery twice, the second attempt on March 7, returned the letter on March 16. The evidence does not show whether the letter carrier left the delivery notice in the Wohlfahrts' mailbox or elsewhere. The Wohlfahrts allege that they had lost the key to the mailbox and did not learn of the attempted delivery until March 18, by which time the letter had been returned. They alleged that they had told Clarence Lee, Jr., the real estate agent with whom they were dealing, of the lost mailbox key and that they had requested that he direct all letters to their office, rather than the residence. The evidence does not show when, if ever, the Wohlfahrts learned of this termination notice. The Baases allege that Lee told them that the Wohlfahrts remained in the house after the March 31, 1997, termination date. Patrick Baas further alleges that the Wohlfahrts failed to pay rent by April 5, 1997, as required by the lease. He drafted a notice to vacate within three days, as permitted by the terms of the lease. That same day Lee hand delivered the notice to the Wohlfahrts. Patrick Baas was told by Lee that the Wohlfahrts remained in possession of the house on April 7, 1997, at which point he instructed Lee to prepare a forcible detainer action. After the forcible detainer action was filed, but before it was served, the Wohlfahrts vacated the premises and the Baases regained possession in mid-April 1997.

Section 4 of the written lease agreement is silent on the issue of whether notice of termination of lease may be given by mail. Generally, however, proper mailing of notice is sufficient. *Cf.* TEX. PROP. CODE ANN. § 92.012(c) (Vernon Supp. 2000) (termination notice under subsection (a) may be sent to a tenant's primary residence by regular United State mail and shall be considered as having been given on the date of postmark of the notice.); TEX. R. CIV. P. 21a (notice required under rules may be sent by certified or registered mail); *Tunnel v. Texas Real Estate Comm'n*, 761 S.W.2d 123, 124 (Tex. App.–Dallas 1988, no writ) (where service by certified mail authorized by statute, service effected when notice properly stamped, addressed, certified, and mailed). Even if we assume that proper mailing establishes only a

presumption of receipt, the Wohlfahrts have not rebutted the presumption. They do not allege that they never received the notice at their residence. They allege only that they do not know if they received the notice at their residence. The lost key does not rebut the presumption of receipt.

The uncontroverted evidence shows the termination notice was sent by registered mail and the Wohlfahrts have not rebutted the presumption. The summary judgment proof shows that the Baases properly terminated the lease. The trial court properly granted summary judgment to the Baases in connection with the lease agreement.

III. Conclusion

Having overruled both of the Wohlfahrts' issues, we affirm the trial court's judgment.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed May 11, 2000.

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

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