SHEELA CHACKO, Individually, As Administratrix of The Estate of JAMES CHACKO, Deceased, And As Next Friend of JOSHUA & CHRISTOPHER CHACKO, MINOR CHILDREN, Appellants v. ABRAHAM P. MATHEW, SUSAN ABRAHAM, SUVISANGAM INVESTMENT INC., D/B/A/ SHIVA INDIAN RESTAURANT & SARANAM INVESTMENT, II, Appellees

NO. 14-07-00613-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

2008 Tex. App. LEXIS 4331

June 12, 2008, Judgment Rendered
June 12, 2008, Memorandum Opinion Filed

SUBSEQUENT HISTORY: Motion for rehearing on petition for review denied by Mathew v. Chacko, 2009 Tex. LEXIS 505 (Tex., July 3, 2009)

PRIOR HISTORY: [*1]
On Appeal from the 240th District Court, Fort Bend County, Texas. Trial Court Cause No. 03-CV-130, 885.

JUDGES: Panel consists of Chief Justice Hedges, and Justices Fowler and Boyce.

OPINION BY: William J. Boyce

OPINION

MEMORANDUM OPINION

Sheela Chacko, acting individually, as administratrix of the estate of James Chacko, deceased, and as next friend of Joshua and Christopher Chacko, minor children, appeals the grant of summary judgment in favor of Abraham P. Mathew, Susan Abraham, Suvisangam Investment Inc., d/b/a Shiva Indian Restaurant and Saranam Investment, II (collectively "Mathew"). Sheela Chacko contends that (1) fact issues concerning the existence of an oral partnership agreement foreclose summary judgment; (2) the statute of frauds does not bar enforcement of the oral partnership agreement because the agreement could be performed within one year; (3) the statute of frauds does not bar enforcement of the oral partnership agreement because James Chacko fully performed his obligations under that agreement; (4) the statute of frauds does not apply because a confidential relationship existed between James Chacko and Abraham Mathew; (5) summary judgment cannot be based upon facts that arose after formation of [*2] the oral partnership agreement; and (6) the statute of frauds does not bar Chacko's non-contractual claims. We reverse and remand.

Background

James Chacko and his brother-in-law, Abraham Mathew, agreed in the summer of 1999 to purchase the Shiva Indian Restaurant from Mahesh Oberoi for $ 130,000. James Chacko's wife, Sheela, contends that James Chacko and Mathew entered into an oral partnership agreement in connection with their purchase of the restaurant. Mathew denies the existence of a partnership.

Oberoi required a $ 50,000 down payment. For the remaining $ 80,000, Oberoi negotiated a lease/purchase agreement with Mathew. The lease/purchase agreement called for the payment of $ 2,553.31 per month over a three-year period commencing on August 15, 1999, and continuing until August 15, 2002, at which time the closing would occur.

James Chacko paid Mathew $ 20,000 by issuing three checks on July 20, 1999. In August 1999, Mathew used James Chacko's $ 20,000 and Mathew's own funds to make the $ 50,000 down payment to Oberoi. Oberoi's corporation, Shiva Investments, Inc., entered into a three-year contract for the sale of the restaurant to Mathew's corporation, Suvisangam Investments, Inc. [*3] on August 15, 1999. [1] Suvisangam Investments, Inc. also entered a sublease agreement with Shiva Investments, Inc. to lease the property at 2514 Times Boulevard in Houston for five years beginning on July 1, 1999.

1 Mathew and his wife jointly owned Suvisangam Investments, Inc.

James Chacko and Mathew jointly operated the restaurant beginning in August 1999. Mathew made payments to James Chacko totaling $ 41,481.52 between October 2000 and November 2001. Sheela Chacko contends these payments represented James Chacko's 40 percent interest in the restaurant's profits pursuant to the oral partnership agreement.

On November 29, 2001, James Chacko fell asleep at the wheel of his car and struck construction debris in the median of the freeway. He died two weeks later from injuries he sustained in the accident. After James Chacko died, Mathew made no payments to Sheela Chacko.

Sheela Chacko attempted to gather information about the restaurant and inquired about her husband's investment after his death. Mathew refused to discuss the matter with her. In September 2002, Mathew issued three checks totaling $ 20,000 to Sheela Chacko as "repayment" of funds he had received from James Chacko to purchase [*4] the restaurant.

Sheela Chacko sued Mathew July 11, 2003, alleging claims for breach of contract, unjust enrichment, civil conspiracy, common law fraud, statutory fraud, alter ego/piercing the corporate veil, redemption of partnership interest, and breach of fiduciary duty. [2] Mathew filed a traditional motion for summary judgment, arguing that "[a]ll [of Chacko's] claims are based upon the existence of an oral partnership agreement. And without such a partnership agreement, all of her claims necessarily fail. To that end, no partnership agreement ever existed as a matter of law, because the statute of frauds prevents the enforcement of such an agreement."

2 On April 5, 2007, Sheela Chacko filed a motion for leave to file a fifth amended petition, simultaneously filing a fifth and a sixth amended pleading. Mathew contested the filing of a fifth amended petition. The trial court denied the motion to file a fifth amended pleading. Plaintiff's Fourth Amended Petition is the operative pleading in this case.

On April 24, 2007, the trial court signed a final judgment granting Mathew's motion for summary judgment and ordering that Sheela Chacko take nothing on all claims. After denial of a motion [*5] to reconsider and a motion for a new trial, Sheela Chacko timely appealed.

Standard of Review

An appellate court applies *de novo* review to a grant of summary judgment, using the same standard that the trial court used in the first instance. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). A traditional summary judgment may be granted if the motion and summary judgment evidence show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant; indulge every reasonable inference favorable to the nonmovant; and resolve any doubts in the nonmovant's favor. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006).

The statute of frauds is an affirmative defense. Tex. R. Civ. P. 94. When a defendant moves for summary judgment pursuant to an affirmative defense, the defendant bears the burden of conclusively establishing all elements of that defense such that no issue of material fact remains. *See* Tex. R. Civ. P. 166a(c); *Moritz v. Bueche*, 980 S.W.2d 849, 856 (Tex. App.--San Antonio 1998, no pet.); *see generally KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999) [*6] ("A defendant moving for summary judgment on [an] affirmative defense . . . has the burden to conclusively establish that defense").

Analysis

Mathew sought summary judgment on grounds that (1) there was no oral partnership agreement; and (2) any such agreement is unenforceable under the statute of frauds. The first summary judgment ground fails because Sheela Chacko proffered sufficient evidence to raise a fact question regarding the existence of an oral partnership agreement between James Chacko and Mathew in connection with the restaurant. Mathew provided a sworn affidavit stating, "There was never a discussion nor an oral agreement between myself and James Chacko regarding a partnership of any kind between the two of us." Sheela Chacko controverted Mathew's affidavit with her own affidavit and deposition testimony asserting that an oral partnership agreement existed. Sheela Chacko's affidavit states,

> In the summer of 1999, I attended a meeting between James Chacko and Abraham Mathew, where Mr. Chacko and Mr. Mathew discussed their purchase of Shiva Indian Restaurant from Mahesh Oberoi . . . . [They] agreed that they would be partners in the business, and they would be entitled to a [*7] 40% and 60% share of the profits of the business . . . .

These conflicting assertions create a fact issue that forecloses summary judgment based on the absence of an oral partnership agreement.

In support of his second summary judgment ground, Mathew invokes the statute of frauds. The statute of frauds provides in pertinent part:

> (a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is:
>
> (1) in writing; and
>
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> (b) Subsection (a) of this section applies to:
>
> (6) an agreement which is not to be performed within one year from the date of making the agreement.

Tex. Bus. & Com. Code Ann. § 26.01 (Vernon Supp. 2007). Whether an agreement falls within the statute of frauds is a

question of law. *Tabrizi v. Daz-Rez Corp.*, 153 S.W.3d 63, 66 (Tex. App.--San Antonio 2004, no pet.); *Metromarketing Servs., Inc. v. HTT Headwear, Ltd.*, 15 S.W.3d 190, 195 (Tex. App.--Houston [14th Dist.] 2000, no pet.).

Mathew relies on our decision in *Gano v. Jamail*, 678 S.W.2d 152 (Tex. App.--Houston [14th Dist.] 1984, no writ), [*8] to bolster his contention that the asserted oral partnership agreement is foreclosed under the statute of frauds because the agreement could not be performed within a year. In *Gano*, this court applied the rule that duration properly may be gleaned from extrinsic evidence when the oral agreement omits the performance term. *Id.* at 154 (citing *Niday v. Niday*, 643 S.W.2d 919, 920 (Tex. 1982)). "If that evidence conclusively proves that the contract cannot be completed within one year, as is the case here, the oral contract violates the Statute of Frauds as a matter of law." *Id.*

At issue in *Gano* was the enforceability of an oral partnership agreement between two lawyers handling personal injury lawsuits. Gano testified that (1) under the parties' oral contract the partnership was to last until all cases were resolved; and (2) such cases last much longer than a year. Based on this evidence, the court concluded that the statute of frauds foreclosed enforcement of the oral partnership agreement because full performance of the agreement could not be completed in one year. *Id.*

Mathew misplaces his reliance on *Gano* because this case involves different circumstances and different evidence. Unlike [*9] *Gano*, the statute of frauds does not foreclose enforcement of the oral partnership agreement at issue here because this agreement was at-will, and performance of the at-will agreement was possible within one year. "A contract that could *possibly* be performed within a year, however improbable performance within one year may be, does not fall within the statute of frauds." *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 149 (Tex. App.--Houston [14th Dist.] 2005, pet. denied) (emphasis in the original) (*citing Hall v. Hall*, 158 Tex. 95, 308 S.W.2d 12, 15 (1957)). A contract does not fall within the statute of frauds based on the absence of a requirement to complete performance within a year; the lack of any expectation that performance will be completed within a year; or the fact that completion within a year proved to be impossible in light of later circumstances. *See Beverick*, 186 S.W.3d at 149-50.

In *Beverick*, appellant admitted that actual performance of the oral agreement took two years to complete, and that he could have completed performance in one year only under very favorable conditions:

> When asked if he could have completed the project in less time, [appellant] testified, "Not [*10] under the circumstances, no. We moved everything along as fast as we could." [Appellant] was asked specifically if there was any way to have completed the project in one year, and he answered, "I mean, if the moon [sic] lined up and if Northern States Power didn't fight to let us go and all of the parties -- you know, we had some pro forma contract to do this on, then it would be easy." [Appellant] testified that "I won't say it was impossible, but there were a lot of things that would have had to fall in place [to complete performance within one year]."

Id. at 149. The court held that "summary judgment evidence, viewed in a light most favorable to [appellant], establishes the possibility that [appellant] could have completed the Project in one year. Therefore, the statute of frauds did not preclude [appellee] from entering into an oral contract with [appellant]." *Id.* at 150. This reasoning applies with equal force here.

The possibility of completing performance within one year is especially germane to at-will partnerships because such arrangements do not contemplate a specific date on which the partnership will terminate. *See Heathington v. Heathington Lumber Co.*, 398 S.W.2d 822, 825-26 (Tex. App.--Amarillo 1966, no writ). [*11] Enforcement of the oral agreement is not foreclosed under the statute of frauds when -- as here -- the time of performance is not established in the oral agreement and the agreement itself does not indicate that performance within a year is impossible. *See Boutell v. Hill*, 498 S.W.2d 713, 714 (Tex. App.--El Paso 1973, no writ).

The oral partnership agreement at issue here contemplated the purchase of Shiva Indian Restaurant. Although the purchase was not consummated until after James Chacko's death -- and more than a year after the creation of the alleged

oral partnership agreement -- the restaurant purchase conceivably could have been accomplished within one year. For that reason, the statute of frauds does not bar enforcement of an oral partnership agreement whose object was to buy and operate the restaurant.

Mathew contends that the oral partnership agreement could not have been performed within a year given the existence of a three-year sales contract and a five-year lease agreement. These agreements are not dispositive as to enforceability of the oral partnership agreement between James Chacko and Mathew. The sales and lease agreements are between Mathew and Oberoi. The sales and [*12] the lease agreements are not agreements between James Chacko and Mathew. These two agreements do not establish that performance of a separate oral partnership agreement between Mathew and James Chacko within a single year was impossible. *See Tabrizi*, 153 S.W.3d at 67 (existence of a two-year note between appellee and lender was no evidence that performance of separate oral contract between appellant and appellee could not be completed within a year's time).

Conclusion

There is a genuine issue of material fact regarding the existence of an oral partnership agreement. The statute of frauds does not bar enforcement of this asserted agreement. Therefore, summary judgment was not warranted.

Because we have determined that summary judgment was not warranted, we do not reach Chacko's remaining arguments on appeal.

The trial court's judgment is reversed and this case is remanded to the trial court.

/s/ William J. Boyce

Justice

Judgment rendered and Memorandum Opinion filed June 12, 2008.