IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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TIM D'JOCK,

Plaintiff,

v.

CHRISTINE STRUNK

Defendant.

OPINION AND ORDER

02-C-381-C

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In this civil action, plaintiff Tim D'Jock contends that defendant Christine Strunk breached her agreement with him to maintain a joint venture to sell clothing. Defendant denies that a joint venture existed, saying that they had a services agreement only. In an opinion and order dated June 13, 2003, I concluded that Wisconsin's statute of frauds barred plaintiff from asserting that he had a five-year joint venture with defendant but that he could still assert a promissory estoppel claim. However, I concluded that under a promissory estoppel theory, plaintiff would be limited to his reliance interest. In addition, I dismissed plaintiff's claims for breach of fiduciary duty and breach of the duty of good faith because these claims were contingent on the existence of a joint venture.

Plaintiff has filed a motion for reconsideration. He argues that this court erred in

concluding that (1) Wisconsin's statute of frauds for contracts of more than one year, Wis. Stat. § 241.02, does not recognize an exception for partial performance; (2) plaintiff's claim for breach of fiduciary duty must be dismissed; and (3) damages are limited to a plaintiff's reliance interest under a promissory estoppel theory. Defendant has not responded to plaintiff's motion.

In his brief in opposition to defendant's motion for summary judgment, plaintiff argued that Wisconsin's statute of frauds should not apply because he had performed part of the contract through activities such as locating and hiring sales representatives, arranging for advertising and delivering customer payments. In the June 13 opinion and order, I noted that Wis. Stat. § 241.02 does not include an express exception for part performance, unlike other statutes of fraud in Wisconsin. See, e.g., Wis. Stat. § 402.201(3)(c) (recognizing part performance exception for agreements for sales of goods); Wis. Stat. § 706.04(3) (recognizing part performance exception for land contracts). This suggests that if the legislature had intended to include a part performance exception in § 241.02, it would have done so expressly. See Kimberly-Clark Corp. v. Public Commission of Wisconsin, 110 Wis. 2d 455, 329 N.W.2d 143 (1983) ("[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.") (internal quotations omitted). In addition, I noted that in Marshall v. Bellin, 27 Wis. 2d 88, 91-92, 133 N.W.2d

751, 752-53 (1963), the court stated that, generally, the doctrine of part performance applies to land contracts only. This is consistent with other states that have limited the part performance exception to land contracts. See, e.g., Collier v. Brooks, 632 So.2d 149 (Fla Ct. App. 1994); Prodromos v. Howard Savings Bank, 692 N.E.2d 707 (Ill. Ct. App. 1998); French v. Sabey Corp., 951 P.2d 260 (Wash Ct. App. 1998).

However, in his motion for reconsideration, plaintiff argues that this conclusion is inconsistent with Nelsen v. Farmers Mutual Auto Insurance Co., 4 Wis. 2d 36, 90 N.W.2d 123 (1958). In that case, the plaintiff had entered into an oral agreement with the defendant to work as an independent contractor. When the plaintiff later sued the defendant for breaching the agreement, the defendant asserted a statute of frauds defense under § 241.02. The court rejected the defendant's argument, first concluding that it did not apply because the contract could have been performed within one year. The court went on to state:

> The crux of the question, however, lies in the fact that, as stated above, Nelsen's performance under the contract, from the moment he started spending his time and money in building up the district agency, constituted a valuable executed consideration for the promise of Services to continue the contract so long as the Insurance Company wrote insurance in Nelsen's district. Such promise, even though by its terms was not performed within a year, is not within the statute of frauds.

Id. at 132.

The court did not use the words "part performance," but I agree with plaintiff that

a similar principle was involved. Also, the court did not address the absence of an express part performance exception in § 241.02. Despite its lack of reasoning, however, the court stated clearly that because the plaintiff spent "time and money in building up the district agency," the agreement was "not within the statute of frauds." The circumstances in this case are not materially distinguishable from the facts in Nelsen. Although the result in Nelsen may appear to be inconsistent with the court's statement in Marshall, that case did not involve § 241.02 as did Nelsen, so it is Nelsen that controls. Therefore, I conclude that plaintiff must be allowed to attempt to enforce his alleged five-year joint venture with defendant.

In her reply brief in support of her motion for summary judgment, defendant argued that the part performance exception did not apply because plaintiff's efforts were not "exclusively referable" to the joint venture agreement. Defendant cited Bunbury v.Krauss, 41 Wis. 2d 522, 164 N.W.2d 473 (1969), for this proposition. Bunbury holds that if a plaintiff's performance is consistent with a different transaction, the statute of frauds still applies. Defendant contends that plaintiff's actions were all consistent with a services agreement, which defendant admits she had with plaintiff. I disagree. According to defendant, the services agreement did not begin until *September 2001.* However, it is undisputed that plaintiff's performance preceded this date by many months. For example, he was assisting in the hiring of at least one sales representative, receiving orders at his store

and setting up a bank "drop box" for receiving customer payments. These activities could not be part of the services agreement because the service agreement did not yet exist. Thus, they are "exclusively referable" to the alleged joint venture agreement. Therefore, the part performance exception to the statute of frauds applies.

Because I have concluded that the statute of frauds does not bar enforcement of the alleged joint venture, I will grant plaintiff's motion for reconsideration. In addition, because the dismissal of plaintiff's claims for breach of fiduciary duty and breach of the duty of good faith were premised on the absence of an enforceable contract, plaintiff may proceed on these claims as well. Finally, my decision that plaintiff may assert the existence of an enforceable contract makes it unnecessary to consider what remedies are available under a promissory estoppel theory.

ORDER

IT IS ORDERED that plaintiff Tim D'Jock's motion for reconsideration is GRANTED. The opinion and order of this court dated June 13, 2003, is MODIFIED to state that defendant Christine Strunk's motion for summary judgment is DENIED with respect to plaintiff's claims that defendant breached a five-year joint venture agreement with plaintiff, that she breached her fiduciary duty to plaintiff and that she breached her duty of

good faith and fair dealing. In all other respects, the order remains as entered.

Entered this24th day of July, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge