IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

TIM D'JOCK,

Plaintiff,

v.

CHRISTINE STRUNK and
VANILIA FASHION,

Defendants.

OPINION AND
ORDER

02-C-381-C

- -

As is the situation in many contract disputes, this case involves two parties who view their agreement from very different perspectives. Plaintiff Tim D'Jock contends that he and defendant Christine Strunk entered into a joint venture to sell clothing made by defendant Vanilia Fashion in the United States and that she breached this agreement when she decided unilaterally to end their collaboration. Defendant Strunk denies that a joint venture existed. Her view is that plaintiff offered initially to help her "as a friend" and that she hired him a year later for an indefinite term to perform administrative services on her behalf.

In addition to his breach of contract claim against defendant Strunk, plaintiff asserted claims against Strunk for breach of the duty of good faith, breach of fiduciary duty, tortious

interference with a contract, promissory estoppel and unjust enrichment. Against defendant Vanilia Fashion, plaintiff asserted claims for breach of contract, promissory estoppel and unjust enrichment. Plaintiff has since withdrawn his claim against defendant Strunk for tortious interference with a contract and his claims against defendant Vanilia Fashion for breach of contract and promissory estoppel.

There is complete diversity of citizenship and the parties agree that the amount in controversy is greater than $75,000. I agree with the parties that federal jurisdiction is present under 28 U.S.C. § 1332.

Both defendants have filed motions for summary judgment. Defendant Strunk contends that plaintiff's breach of contract claim is barred by Wisconsin's statute of frauds because there was no written agreement. Plaintiff contends that the statute of frauds should not apply or, in the alternative, that he has a viable promissory estoppel or unjust enrichment claim. Because defendant Strunk has admitted in her answer that she had a "services agreement" with plaintiff from September 2001 until March 2002, I conclude that the statute of frauds does not apply to that agreement. However, plaintiff has failed to persuade me that the statute of frauds should not apply to the alleged five-year joint venture agreement. Plaintiff relied on the existence of a joint venture for his breach of fiduciary duty claim. Because the statute of frauds voids the joint venture, the breach of fiduciary duty claim must be dismissed. Plaintiff's claim for breach of the duty of good faith survives to the

extent that plaintiff is alleging that defendant Strunk violated her duty of good faith with respect to the services agreement.

Although plaintiff may not proceed on a breach of contract claim with respect to the five-year joint venture, the statute of frauds does not bar plaintiff from proceeding on a promissory estoppel or unjust enrichment claim. Thus, defendant Strunk's motion for summary judgment will be granted in part and denied in part. Plaintiff's claim that defendant Vanilia Fashion has been unjustly enriched will be dismissed because I conclude that it would not be inequitable for defendant Vanilia to retain whatever benefits plaintiff's services may have conferred.

In addition to its motion for summary judgment, defendant Vanilia has filed a motion for leave to file counterclaims. This motion will be denied. Defendant Vanilia filed its motion only two weeks before the deadline for filing dispositive motions. With trial little more than two months away, allowing Vanilia to begin prosecution of new claims would cause undue delay. Defendant Vanilia does not contend that its counterclaims arise out of the same transaction as plaintiff's claims so that they must be brought in this lawsuit or be forfeited. Particularly because I am granting defendant Vanilia's motion for summary judgment in full, I see little reason to keep Vanilia in this lawsuit for the sole purpose of deciding an unrelated claim brought at the last minute.

From the proposed findings of fact, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiff Tim D'Jock is a citizen of the state of Wisconsin. He owns a retail store in Siren, Wisconsin, called Jackpine Trading Company (formerly named Creative Jewelers), in which he sells jewelry, clothing and outdoor gear. Defendant Christine Strunk is a citizen of Germany. In 2000, defendant Strunk was a sales representative for La Rochelle, a German fashion house. Defendant Vanilia Fashion is a German corporation with its principal place of business in Neuss, Germany. Vanilia designs and sells women's apparel.

Plaintiff met defendant Strunk in 1995 through her uncle, who lived in Siren and was a friend of plaintiff. Between 1995 and 2000, plaintiff and defendant Strunk saw each other five or six times during visits with her relatives in Siren.

Plaintiff learned about defendant Vanilia Fashion during one of these visits when defendant Strunk gave her relatives clothes made by Vanilia Fashion. (Defendant Strunk became familiar with defendant Vanilia through a friend, who was a sales representative for the company.) Noticing how pleased they were with the gifts, plaintiff asked defendant Strunk in September 2000 why no one was selling Vanilia's product in the United States. Plaintiff offered to investigate the requirements for importing and selling Vanilia clothes while Strunk, who speaks German, attempted to obtain a contract with defendant Vanilia. Defendant Strunk told plaintiff that she would "check into it." (The parties dispute whether plaintiff and defendant Strunk agreed to form a business collaboration or whether plaintiff

offered his services "gratuitously . . . as a friend.")

Defendant Strunk heard back from defendant Vanilia in December 2000; it informed her that the territory covering the United States was available. (The parties dispute whether Strunk told plaintiff that Vanilia had agreed to allow them to sell its clothing at this time.) At some point after December 2000, plaintiff began performing work for what he viewed as a partnership with defendant Strunk. He helped locate sales representatives; he "addressed" issues such as German invoices and acknowledgments, which were confusing to most of the sales representatives; he developed a method for processing invoices; he provided sales representatives with the forms they needed, including tax forms; and he arranged for advertising in a trade magazine and was responsible for delivering customer payments.

Between February and August 2001, plaintiff received small sample orders of Vanilia pants at his store. In July 2001, Strunk and plaintiff both signed an offer to customers of Hal Turner, a sales representative, for test orders of Vanilia pants. Also in the summer of 2001, plaintiff investigated setting up a bank "drop box" for receiving customer payments. In September 2001, plaintiff received a test order of 300-350 pairs of Vanilia pants. At least after September 2001, plaintiff and defendant Strunk agreed that plaintiff would be compensated with a percentage of Vanilia sales made in the United States.

Plaintiff had authority to deposit customer payments in defendant Vanilia Fashion's United States bank account. In addition, Vanilia named plaintiff "importer of record" in

a letter to the UPS Customhouse. (On its website, defendant Vanilia listed plaintiff as its "United States Agent." The parties agree that this label actually meant that plaintiff was Vanilia's "importer of record.") Vanilia was aware that plaintiff was working on a website to promote Vanilia products for trade shows in the United States. Vanilia did not promise to pay plaintiff for any of his services.

On January 28, 2002, plaintiff and defendant Strunk signed a letter to Doug Chambers, a sales representative in Dallas, Texas, advising him not to sell outside his designated territory. The letter states, "[W]e are in the process of choosing reps for other areas" and that "[W]e are in contact with people in other areas and we don't want to jeopardize negotiations with them."

In February 2002, defendant Strunk entered into a written contract with defendant Vanilia. The contract names Strunk as the principal representative for Vanilia pants in the United States. The contract was backdated to September 2001, with the term running until August 31, 2006. Plaintiff was not a party to the contract.

On March 28, 2002, plaintiff sent a letter to defendant Vanilia's president, Heinz Consul, in which plaintiff requested that Consul "resolve certain aspects of our business relationship," such as "[w]hat is my Vanilia Fashion role & business title" and "[t]he terms of my contract as the Vanilia U.S.A. business coordinator." On April 30, 2002, defendant Strunk sent plaintiff an e-mail to explain her "decision not to continue any business

collaboration" with him.

Plaintiff and defendant Strunk never formed a legal partnership. No bank account exists in the name of a joint venture or partnership between plaintiff and defendant Strunk.

DISPUTED FACTS

I find that the following facts are disputed; I have construed them in favor of plaintiff as favorably as the record permits. Hunt v. City of Markham, Illinois, 219 F.3d 649, 652 (7th Cir. 2000).

In his September 2000 discussion with defendant Strunk, plaintiff told her to get a contract with defendant Vanilia so that the two of them could sell Vanilia clothes in the United States. Plaintiff and defendant Strunk agreed to a five-year term, to be concurrent with a five-year term that Strunk would obtain from defendant Vanilia. After September 2000, plaintiff and defendant Strunk confirmed the contract in numerous conversations with each other. Defendant Strunk repeatedly told plaintiff that he was her "partner." It was plaintiff's idea to sell Vanilia clothes through independent sales representatives. In December 2000, defendant Strunk told plaintiff that defendant Vanilia had agreed to make garments available for Strunk and plaintiff to sell in the United States.

In May 2001, plaintiff and defendant Strunk agreed that Hal Turner, a sales representative, would receive a 15% commission on all sales in his territory. Defendant

Strunk would receive 8% and plaintiff would receive 3%. In October 2001, plaintiff and defendant Strunk agreed to pay Douglas Chambers a 12% commission on his sales. Plaintiff and defendant Strunk would receive 6% and 8% respectively. Plaintiff and defendant Strunk made the same agreement with respect to the sales of Donna Haggett and Jann Meyers, who were hired in January and February 2002. When sales representative John Horlacher was hired in January 2002, plaintiff and defendant Strunk agreed that they would each receive 8% of his sales. The decision to hire these sales representatives and several others was made jointly by plaintiff and defendant Strunk

Plaintiff prepared the business plan for the joint venture.

On May 1, 2002, defendant Strunk told plaintiff he was terminated. (According to defendant Strunk, plaintiff was terminated in March 2002.)

OPINION

A. Breach of Contract and Statute of Frauds

It is undisputed that there is no written contract between plaintiff and defendant Strunk. Thus, defendant Strunk argues, any oral agreement that may have existed between her and plaintiff is void under Wisconsin's statute of frauds, Wis. Stat. § 241.02. (Because both sides have applied Wisconsin law in their briefs, I will do the same. See FutureSource LLC v. Reuters Limited, 312 F.3d 281, 283 (7th Cir. 2002) ("[T]here's no discussion of

choice of law issues, and so we apply the law of the forum state."); see also State Farm Mutual Auto Insurance Co. v. Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662 (holding that Wisconsin courts should assume that Wisconsin law applies unless it is clear that non-forum contacts are more significant)).

Under § 241.02(1)(a), "[e]very agreement that by its terms is not to be performed within one year from the making thereof" must be in writing. Plaintiff advances three reasons why this provision does not void his agreement with defendant Strunk: (1) the agreement could have been fully executed within one year, making the statute inapplicable; (2) defendant Strunk admits that she had a contract with plaintiff, triggering the judicial admission exception to the statute of frauds; and (3) his part performance of the agreement "takes [it] out of the statute of frauds."

1. Performance in one year

The Wisconsin Supreme Court has interpreted § 241.02(1)(a) as applying only when the terms of an agreement make it *impossible* for it to be performed in less than one year. Nelson v. Farmers Mutual Automobile Insurance Co., 4 Wis. 2d 36, 52, 90 N.W.2d 123, 132 (1958). For instance, because contracts for an indefinite duration *could* be completed within a year, they are not void if made orally. See, e.g., Landess v. Borden, Inc., 667 F.2d 628 (7th Cir. 1981); Treat v. Hiles, 68 Wis. 344, 32 N.W. 517 (1887). Plaintiff alleges that

his agreement with defendant Strunk was to last five years. However, plaintiff argues that the contract *could have* been completed in less than a year *if* Strunk had not been able to obtain a contract with defendant Vanilia to sell its clothing in the United States.

The problem with plaintiff's argument is that he is collapsing two promises into one. According to plaintiff, defendant agreed to (1) try to get a contract with defendant Vanilia; and (2) enter into a five-year partnership or joint venture if she was successful. It is only the first of these promises that could have been completed in less than a year and plaintiff is not seeking to recover for a breach of that promise. Rather, he wants to enforce the promise to collaborate with him *for five years.* If defendant Strunk had failed to get a contract with defendant Vanilia, the second promise could not have been performed *at all*, much less within a year. Accordingly, I conclude that § 241.02(1) applies.

2. Judicial admission exception

Plaintiff emphasizes that no statute of frauds defense should be available to defendant Strunk because she admitted in her answer that she had a "services agreement" with plaintiff. Under Wis. Stat. § 402.201(3)(b), a party who admits the existence of a contract for a sale of goods in judicial proceedings may not assert a statute of frauds defense. However, there is no analog to § 402.201(3)(b) in § 241.02(1) and the Wisconsin courts have not yet addressed the question whether a "judicial admission" exception is implied in § 241.02(1).

Nevertheless, plaintiff contends this court should recognize such an exception because it is consistent with the purpose of the statute of frauds, which is to "prevent fraud and perjury, not to give one party or another a technical escape from a fair and definite agreement." US Oil Co. v. Midwest Auto Care Services, Inc., 150 Wis. 2d 80, 440 N.W.2d 825 (Ct. App. 1989). He relies on DF Activities Corp. v. Brown, 851 F.2d 920 (7th Cir. 1988), in which the court assumed that a judicial admission exception existed, but Brown involved the application of Illinois law, so its authority is limited.

I conclude that is unnecessary to decide whether there is a judicial admission "exception" to the statute of frauds. Rather, I am persuaded that the statute of frauds does not apply to a contract that is admitted in the defendant's answer. Section 241.02(1) does not require that the agreement itself be in writing; it requires only a signed "note or memorandum" of the agreement. Furthermore, the statute imposes no time restriction on the writing. Accordingly, I conclude that defendant Strunk's answer satisfies the writing requirement of § 241.02(1), because it affirmatively alleges a contract between her and plaintiff. See Bower v. Jones, 978 F.2d 1004 (7th Cir. 1992) (holding that defendant's answer satisfied writing requirement of Illinois's statute of frauds).

However, Strunk's admission does not resolve the statute of frauds issue. Strunk admits only that she agreed to pay plaintiff a percentage of sales in exchange for the performance of "certain administrative and clerical services" from September 2001 through

March 2002. She does not admit that she agreed to enter into a joint venture with plaintiff for five years. Plaintiff appears to view this limitation as irrelevant, suggesting that once a defendant admits to the existence of a contract, *any* contract, with the plaintiff, the statute of frauds is inapplicable regardless of the divergence in the parties' views of the nature of the contract. I cannot agree. As plaintiff points out, a purpose of the statute of frauds is to prevent parties from manufacturing contracts that never existed. This concern is not resolved in full simply because the parties agree that *a* contract existed. Consider this example: Party B pays Party A to paint her house. Party A then sues Party B, alleging that Party B made an oral agreement to sell her house to him for five dollars. Under plaintiff's view, if Party B admits she agreed to pay Party A to paint her house, she would be estopped from asserting a statue of frauds defense.

Plaintiff cites no authority to support this counter intuitive result. Under the judicial admission exception to the statute of frauds for sales of goods, "the contract is not enforceable . . . beyond the quantity of goods admitted." Wis. Stat. § 402.201(3)(b). Applying that limitation by analogy in this case, the statute of frauds still bars plaintiff from enforcing an alleged contract for a five-year joint venture. Other authority supports this conclusion. See Richard A. Lord, Williston on Contracts § 27:10, at 89 (1999) ("In order for an admission to operate to remove the bar of the Statute, it must in fact be an acknowledgment *of the contract alleged*.") (Emphasis added.) Because the only contract

admitted by defendant Strunk is one for performing services between September 2001 and March 2002, this is the only agreement between plaintiff and defendant Strunk to which the statute of frauds does not apply.

3. Part performance

Wisconsin courts have recognized a "part performance" exception to the statute of frauds, in which an oral agreement may be enforced if a party has "changed his position to his own detriment to the extent that an injustice would be done by permitting an invocation of the statute of frauds." Toulon v. Nagle, 67 Wis. 2d 233, 226 N.W.2d 480, 488 (1975). Plaintiff contends that this exception should apply in his case because he devoted substantial amounts of time and resources to what he viewed as a joint venture.

Again, a problem with this argument is that Wisconsin courts have not recognized a part performance exception to the statute of frauds under Wis. Stat. § 241.02. It appears that the part performance exception has been limited to instances in which it is provided expressly by statute, see Wamser v. Bamberger, 101 Wis. 2d 637, 305 N.W.2d 158 (Ct. App. 1981) (part performance of oral security agreements under Wis. Stat. § 408.319 (1978-1979); Stan's Lumber , Inc. v. Fleming, 196 Wis. 2d 554, 538 N.W.2d 849 (Ct. App. 1995) (part performance of sales of goods under Wis. Stat. 402.201(3)(c)), Brevig v. Webster, 88 Wis. 2d 165, 277 N.W.2d 321 (Ct. App. 1979) (part performance of land contract under

Wis. Stat. § 706.04(3)). The Wisconsin Supreme Court has expressly rejected application of the exception to other types of contracts. See Marshall v. Bellin, 27 Wis. 2d 88, 91-92 133 N.W.2d 751, 752-53 (1963) ("[T]he equitable doctrine of part performance does not apply to oral promises to answer for the debt of another. The equitable doctrine of part performance applies generally to the sale of land.") (Citations omitted.) This is consistent with other jurisdictions that have limited the part performance exception to land contracts unless otherwise provided by statute. 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 Corporation, 951 P.2d 260 (Wash. Ct. App. 1998).

Without an express exception for part performance in the statute or Wisconsin case law supporting plaintiff's position and given the trend in other states toward rejecting the exception outside the context of land contracts, I cannot conclude that there is a part performance exception to § 241.02(1).

B. Breach of Fiduciary Duty and Breach of the Duty of Good Faith

In his brief, plaintiff relied on the existence of a joint venture to support his claim for breach of fiduciary duty. See Plt's Br, dkt. #38, at 9 (citing Jolin v. Oster, 44 Wis. 2d 623, 172 N.W.2d 12 (1969)). Because the statute of frauds voids whatever joint venture may have existed, plaintiff's claim for breach of fiduciary duty must be dismissed. Similarly, the

duty of good faith and fair dealing attaches only when there is a valid contract. See WIS-JI-CIVIL 3044. Thus, plaintiff's claim for breach of this duty survives only to the extent that plaintiff is alleging that defendant Strunk acted in bad faith with respect to the services agreement between September 2001 and March 2002.

C. Promissory Estoppel

Although I have concluded that plaintiff and defendant Strunk did not enter into an enforceable contract for a five-year joint venture, this does not mean that plaintiff is left without remedy. Even when the statute of frauds voids a contract in Wisconsin, it cannot bar a claim for promissory estoppel. US Oil, 150 Wis. 2d at 91, 440 N.W.2d at 829 (citing Clark Oil & Refining Co. v. Leistikow, 69 Wis. 2d 226, 230 N.W.2d 736 (1975) and Rossow Oil Co. v. Heiman, 72 Wis. 2d 696, 242 N.W.2d 176 (1976)). Although a party cannot recover his expectation interest under a promissory estoppel theory, he may recoup amounts expended in reliance on the other party's promise. Werner v. Xerox Corp., 732 F.2d 580, 584 (7th Cir. 1984).

To prevail on a promissory estoppel claim in Wisconsin, a plaintiff must show that he relied on a promise made by the defendant, that his reliance was reasonable and that the promise must be enforced to avoid injustice. Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 694, 133 N.W.2d 267, 273 (1965) (citing Restatement of Contracts § 90). For the

purpose of her motion, defendant Strunk does not deny that plaintiff relied on a promise she made or that injustice would result by not enforcing the promise. Instead, she contends that plaintiff's reliance on her alleged promise was not reasonable because the promise was conditional. Strunk cites Cosgrove v. Bartolotta, 150 F.3d 729, 733 (7th Cir. 1998), for the proposition that a plaintiff has no claim for promissory estoppel if he knew he was "investing in a chance." See also Gruen Industries, Inc. v. Biller, 608 F.2d 274, 281 (7th Cir. 1979) ("The conditional promise alleged is not a reasonable basis for reliance and thus not a proper basis for estoppel."). She argues that the reasoning of Cosgrove applies in this case because in September 2000, when plaintiff alleges that they entered into a joint venture agreement, they did not yet know whether defendant Vanilia would allow them to sell its clothing in the United States.

If plaintiff were suing defendant Strunk because she had been unable to obtain an agreement with defendant Vanilia, I would agree with her that there was no enforceable promise. Strunk, however, *was* able to obtain the rights to sell Vanilia clothes in the United States and plaintiff alleges that she *continued* to represent to him that they had a partnership agreement. In response, defendant Strunk argues that there is no evidence to support plaintiff's allegation that she re-affirmed her promise. I disagree; in his deposition, plaintiff testified that defendant Strunk reaffirmed her promise in several conversations with him and that she called him her "partner" throughout their business relationship. In addition,

plaintiff has submitted competent evidence that he was doing work for what he viewed as the joint venture throughout 2001 and before the date that defendant Strunk maintains that she hired him to perform administrative services and that she did not inform him that his services would be uncompensated. See In re Voss' Estate, 20 Wis. 2d 238, 121 N.W.2d 744 (1963) (promise may be implied when defendant allows non-relative plaintiff to perform services for her); Manufacturers & Merchants Inspection Bureau v. Everwear Hosiery Co., 152 Wis. 73, 138 N.W. 624 (1912). Thus, there is evidence that defendant Strunk communicated to plaintiff in both word and deed that they had a business agreement. This is sufficient to create a genuine issue of material fact.

Next, defendant Strunk argues that the alleged re-affirmations of the agreement were conditional as well because they did not establish a precise time when plaintiff's and defendant Strunk's commission rate would become equal. I agree with defendant Strunk that this qualification made some of the terms of the agreement conditional; thus, plaintiff cannot prevail on an argument that he reasonably relied on a promise that he would receive the same compensation as defendant Strunk. But the condition as to future earnings would not have eviscerated the promises that Strunk made to plaintiff regarding the then-present compensation arrangement. Reliance on these promises would not be unreasonable simply because future arrangements had not yet been nailed down. Defendant Strunk's motion for summary judgment will be denied with respect to plaintiff's promissory estoppel claim.

C. Unjust Enrichment

Plaintiff has withdrawn all of his claims against defendant Vanilia Fashion except the unjust enrichment claim. He also asserts an unjust enrichment claim against defendant Strunk, who addressed this issue in her reply brief only. Thus, she has waived her argument that she is entitled to summary judgment on this claim. Nelson v. La Crosse County District Attorney, 301 F.3d 820, 836 (7th Cir. 2002). To prevail on his claim against defendant Vanilia, plaintiff must show that he conferred a benefit on defendant Vanilia, that Vanilia "knew of or appreciated" the benefit and that retention of the payment without benefit would be inequitable. Halverson v. River Falls Youth Hockey Association, 226 Wis. 2d 105, 115, 593 N.W.2d 895, 900 (Ct. App. 1999).

It is undisputed that plaintiff had no contract with defendant Vanilia and that it made no promises to him. It is true that plaintiff performed services that may have benefitted Vanilia, but plaintiff has adduced no evidence that he had a reasonable expectation that he would be compensated by Vanilia, at least not directly. The facts show that Vanilia believed that the services plaintiff provided would be compensated through his agreement with defendant Strunk. In a sense, this agreement did contemplate payment by Vanilia because plaintiff was receiving a percentage of *Vanilia's* sales. To the extent that this did not occur, it was a result of defendant Strunk's conduct, not Vanilia's. With no evidence suggesting that defendant Vanilia acted in bad faith or took advantage of plaintiff, I cannot

conclude that it would be unjust to decline to force defendant Vanilia to pay for services that it believed it was already paying for through defendant Strunk. Therefore, defendant Vanilia Fashion's motion for summary judgment will be granted.

ORDER

IT IS ORDERED that

1. Defendant Vanilia Fashion's motion for leave to file counterclaims is DENIED.

2. Defendant Vanilia Fashion's motion for summary judgment is GRANTED and this defendant is DISMISSED from this case.

3. Defendant Christine Strunk's motion for summary judgment is GRANTED with respect to plaintiff Tim D'Jock's claims that she breached a five-year contract for a joint venture with plaintiff, that she breached her fiduciary duty and that she tortiously interfered with a contract. Her motion is DENIED with respect to a claim that she breached a services agreement with plaintiff between September 2001 and March 2002 and that she breached her duty of good faith to plaintiff with respect to this agreement. In addition, defendant Strunk's motion is DENIED with respect to plaintiff's promissory estoppel and unjust

enrichment claims.

Entered this 13th day of June, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge