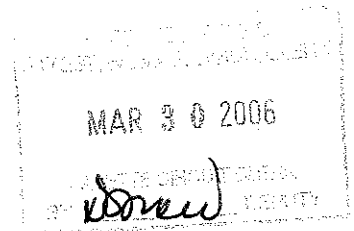


Trial court grants JNOV, thereby setting aside a \$960,000.00 jury verdict.

FAYETTE CIRCUIT COURT
CIVIL BRANCH
THIRD DIVISION
CIVIL ACTION NO. 03-CI-1679



BARBARA LUCINDA SAWYER

PLAINTIFF

VS

OPINION AND ORDER

MELBOURNE MILLS, JR.

DEFENDANT

This matter is before the Court on Motion of the Defendant, Melbourne Mills, Jr. (hereinafter "Mel"), pursuant to CR 50.02 for Judgment Notwithstanding the Verdict (hereinafter "JNOV"), or, alternatively, for a New Trial pursuant to CR 59. The Court has reviewed Mel's Memorandum of Law filed in support of said pending Motions, the Response thereto filed by the Plaintiff, Barbara Lucinda Sawyer (hereinafter "Cindy"), and Mel's Reply. The Court has also had the benefit of Oral Arguments of Counsel for both parties. The Motions are ripe for consideration. The Court now renders its Opinion and Order as follows:

JNOV STANDARD

In considering Mel's pending Motions for JNOV or, alternatively, for New Trial, this Court is required to consider the evidence in the light most favorable to the Party opposing the Motion and to give that party every reasonable inference that can be drawn from the record. Brewer v. Hillard, 15 S.W.3d 1, 9 (Ky. App. 1999). Further guidance on the standard to be applied by this Court is found in Taylor v. Kennedy, 700 S.W.2d 415, 416 (1985) that the Motion (for JNOV) is not to be granted "...unless there is a complete absence of proof on a material issue in the action, or if no disputed issue of fact exist upon which reasonable men could differ." See

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also Moore v. Environmental Construction Corporation, 147 S.W.3d 13, 16 (Ky. 2004) which cited Taylor v. Kennedy, supra with approval.

In the case at bar, the Jury Verdict in favor of Cindy, the Judgment entered by this Court on or about February 9, 2006 and the entire evidence presented at the trial of this matter are accepted by the Court in the light most favorable to the verdict winner, Cindy. Taylor v. Kennedy, supra; Moore v. Environmental Construction Corporation, supra; and Crest Coal Co. v. Bailey, 602 S.W.2d 425 (Ky. 1980). In that light, the Court accepts as true for purposes of these pending Motions by Mel all of the following:

(1) That Mel had discussed with Cindy, from 1994 to June 25, 2001, that he would reward Cindy for her loyalty to his law firm and for her precedent breaking idea for Mel to begin accepting work in “class action litigation” because of its potential for significant financial benefits;

(2) That the amount of any bonus to be paid by Mel to Cindy was left intentionally unclear and unspecified because neither party knew if any of the “class action litigation” would prove profitable to Mel’s law firm or in what amounts;

(3) That any bonus to be paid by Mel to Cindy would only be paid “when the ship comes in” which was understood to be when the “class action litigation” proved to be financially rewarding to Mel’s law firm;

(4) That on June 25, 2001, shortly after the class action litigation involving “Fen-Phen” diet drug litigation had been settled and a substantial fee had been received by Mel’s firm, an agreement was reached by Mel and Cindy as to the amount of the bonus and the terms of its payment;

(5) That in the June 25, 2001 conversation between Mel, Cindy and Cindy's husband, Steve Sawyer (hereinafter "Steve"), the figure of One Million Dollars (\$1,000,000.00) was first proposed by Cindy and Steve as a lump sum payment. Mel clearly balked at that figure as a lump sum payment. Quickly, Steve Sawyer, with Cindy's encouragement and agreement, suggested that a total payment of One Million Dollars (\$1,000,000.00) plus the cost of a new luxury car to be paid over ten (10) years at Ten Thousand Dollars (\$10,000.00) per month until paid would be acceptable to them. This was the undisputed sworn testimony of Cindy, Steve, and their attorney Mark Mosely at trial. The Court, in accordance with the above JNOV standard, accepts that testimony without qualification. Further, that testimony was accepted by the jury in this case as reflected by the jury verdict when "Yes" was checked in response to Interrogatory No. 1 which specifically found that Cindy and Mel had each understood and agreed that Mel would pay Cindy a bonus in the amount of One Million Dollars and the value of a new car costing Sixty Five Thousand Dollars for services performed by Cindy for the benefit of Mel per Jury Instruction No. 1;

(6) That Mel paid Cindy the sum of Sixty-Five Thousand Dollars (\$65,000.00) in amounts ranging from Ten Thousand Dollars (\$10,000.00) to Fifteen Thousand Dollars (\$15,000.00) from June 25, 2001 until mid February 2002 plus a lump sum payment of One Hundred Thousand Dollars (\$100,000.00) in or about October 2001 in accordance with that agreement¹;

¹The Court recognizes that Mel testified and argued that the payment of Sixty-Five Thousand Dollars (\$65,000.00) was not payment in accordance with his agreement with Cindy but rather was payment for a ship painting by Steve Sawyer. However, in accordance with the JNOV standard set out above, the Court accepts the evidence in the light most favorable to Cindy and therefore premises its consideration of the pending Motions consistent with Cindy and her

(7) That Mel broke his promise to and agreement with Cindy in mid-February 2002 and thereafter by failing to make any further payments to her in accordance with his promise and their agreement;

(8) That Mel testified at trial and the jury found that he had the financial resources necessary to pay off the total amount promised to Cindy within one year of June 25, 2001 as reflected in the jury verdict checked "Yes" to Interrogatory No. 2;

LEGAL ANALYSIS AND OPINION

KRS 371.010 (7) provides as follows:

No action shall be brought to charge any person:

(7) Upon any agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.

The Court had previously addressed its concerns that this Statute of Frauds barred the claims of Cindy against Mel in this case. However, out of an abundance of precaution, in order to allow Cindy to present her full evidence at trial before a jury, the Court Overruled Mel's Motion for Summary Judgment on this issue in an Opinion and Order entered December 1, 2005.

witnesses on this issue. Further, Mel testified and argued that the lump sum payment of One Hundred Thousand Dollars (\$100,000.00) made by him to or on behalf of Cindy in October 2001 was a gift because of an impending eviction of Steve Sawyer from his art studio. However, once again, viewing the evidence in the light most favorable to Cindy, the Court accepts the testimony of Cindy and her witnesses that the lump sum payment was a "pre-payment" by Mel on the aforementioned agreement of the parties.

Cindy has now had that full opportunity to present her testimony as well as the testimony of her husband and attorney regarding the agreement and Mel's promises to her. As discussed previously in this Opinion, trial testimony from Cindy, or on her behalf, established that Mel had orally agreed in 1994 to pay Cindy a bonus to reward her for her loyalty and for her assistance and persistence in getting his law firm involved in class action litigation. There was no discussion of amount or when the bonus would be paid except when "the ship comes in". Cindy testified and the jury found that Mel had made such a promise which came to fruition with the settlement of the "Fen-Phen" class action litigation which resulted in substantial fees accruing to the benefit of Mel's law firm in June 2001.

At a meeting between Cindy, Mel and Cindy's husband, Steve Sawyer that occurred on June 25, 2001, which was surreptitiously recorded by Cindy and Steve, the parties agreed that Mel would pay to Cindy a bonus totaling One Million Dollars (\$1,000,000.00) plus the cost of a new luxury car which the parties agreed would be an additional amount of Sixty-Five Thousand Dollars (\$65,000.00) to be paid in monthly installments of Ten Thousand Dollars (\$10,000.00) on the first of each month until fully paid. (Emphasis added) The testimony of Cindy and Steve was undisputed and unequivocal on these terms and was confirmed in the tape recording which was played to the jury at this trial. As set out above, it was undisputed from the testimony of Cindy, Steve and their attorney, Mark Moseley, that the figure of One Million Dollars (\$1,000,000.00) was first mentioned by Cindy and Steve to Mel to be paid in a lump sum amount. Mel clearly balked at that figure and those terms and did not agree to them. Quickly, sensing that an opportunity was about to be lost, primarily Steve, with Cindy's encouragement and agreement, proposed to Mel that it would be acceptable to them that the total of the bonus

would be One Million Sixty-Five Thousand Dollars (\$1,065,000.00) but that the amount would be paid in monthly installments of Ten Thousand Dollars (\$10,000.00) on the first of each month thereafter. Mel accepted this suggestion and agreed orally to that total amount and terms of payment. The jury also found this agreement in its verdict. This amount and the terms of payment as the claim of Cindy is also reflected in her Answer to Interrogatory No. 8 in which she stated in her Amended Answer under oath in part as follows:

The bonus was to be paid in monthly installments of \$10,000.00 and on the first of each month.

The terms of the bonus as aforesaid was confirmed in the draft agreement prepared by Cindy's attorney, Hon. Mark Moseley, after a telephone conversation with his client and with Mel. The draft agreement was never signed by Mel. Nonetheless, numerical paragraphs 1 and 2 of that draft agreement prepared by Attorney Moseley provided that the bonus in the total amount of One Million Sixty-Five Thousand Dollars (\$1,065,000.00) was due and payable in monthly installments of Ten Thousand Dollars (\$10,000.00) per month for a period of one hundred (100) months... (Emphasis added). Attorney Moseley's draft agreement recognized that the total amount would be paid out in a total of one hundred seven months with the last month's payment to be in the amount of \$5,000.00. The trial testimony and evidence, taken in the light most favorable to Cindy, and fully accepting the jury verdict in that regard, clearly provided that the bonus amount, by clear agreement of Mel and Cindy, was to be paid over a total of one hundred seven months (107) duration.

Mel declined to sign Attorney Moseley's draft Agreement which had been prepared in accordance with the discussions and agreement of Mel and Cindy. Cindy produced no writing

signed by Mel consistent with the oral discussions of the parties. Cindy argues that the “writing” requirement of the Statute of Frauds codified at KRS 371.010(7) has been satisfied in this case because of the cassette tape which was played to the jury and which surreptitiously recorded the discussions between Cindy, Mel and Steve on June 25, 2001 taken together with the several checks written by Mel and signed by him totaling One Hundred Sixty-Five Thousand Dollars (\$165,000.00). The Court can not accept this argument. First of all, the cassette tape recording is not a “writing signed by the party to be charged” as required by the aforementioned Statute of Frauds. The checks signed by Mel are, at best, evidence confirming the agreement of the parties as set out above, i.e., that the total amount of the bonus would be paid out in monthly installments of \$10,000.00 on the first of each month for one hundred seven (107) months. These checks, at best, merely confirm the oral agreement of the parties.

Cindy further argues that the “writing” requirement of KRS 371.010(7) has been satisfied by the Electronic Signatures in Global and National Commerce Act codified at 15 U.S.C. § 7001 *et seq.* There was no testimony or evidence presented at trial by Cindy that Mel had somehow agreed in writing to the oral promise through an electronic signature or otherwise. There was no evidence or testimony at trial that Attorney Moseley’s draft Agreement was sent to Mel electronically (via e-mail) and electronically signed by Mel. The Court does not believe that the aforementioned Federal Statute on electronic signatures, which was not even done in this case, somehow satisfies the “writing” requirement of Kentucky’s Statute of Frauds.

Both the testimony and evidence of Cindy, her husband and her attorney, taken in the light most favorable to Cindy, coupled with the draft Agreement prepared by Attorney Moseley on behalf of Cindy and the jury verdict, the Court accepts for purposes of the pending Motion by

Mel, that the oral agreement reached between Mel and Cindy on June 25, 2001 provided for a total payment of One Million Sixty-Five Thousand Dollars (\$1,065,000.00) to be paid in monthly installments of \$10,000.00 on the first of each month. While it was initially raised by Cindy and Steve that the bonus would be a lump sum payment, that was unequivocally rejected by Mel. The testimony of Cindy and Steve at trial, the testimony of Attorney Moseley and his draft Agreement, and Cindy's Amended Answer to Interrogatory No. 8 all clearly and explicitly provide that the bonus was to be paid in monthly installments and that it would take one hundred seven (107) months to complete the payment plan. It was never the agreement or the understanding of the parties that Mel would make "pre-payments" or "advancements" or whatever other term that may be utilized in completing his obligations under this oral agreement. "Pre-payments" or "advancements" were simply not part of the final oral agreement of Cindy and Mel and, as such, was a factor not contemplated by the parties to be done at the time of the making of this oral agreement. This determination by the Court is based upon undisputed testimony at trial from Cindy and Steve, from Attorney Moseley and in reviewing his draft Agreement, and taking all of that evidence in the light most favorable to Cindy for all considerations and purposes.

With that foundation, the Court looks to Kentucky law on the subject. The Court finds most persuasive the holding of the highest Appellate Court in Kentucky at the time in Williamson v. Stafford, 301 Ky. 59, 190 S.W.2d 859 (1945). The dispute in Williamson concerned an oral contract for logging operations and delivery of logs to sawmills. By the terms of the agreement and the contemplation of the parties, the obligations of the parties were not to be performed within a year. (Emphasis added). The Plaintiff in Williamson, as Cindy does in the

case at bar, argues that the contracts could have been performed within one year and therefore they were not within the Statute of Frauds codified at KRS 371.010(7). The Court in Williamson held as follows:

In construing the Statute of Frauds, the general rule is that, if a contract may be performed within a year from the making of it, the inhibition of the Statute does not apply, although its performance may have extended over a greater period of time. (Citations omitted)

There is a well- recognized exception to the rule above recited, and that is that when it was contemplated by the parties that it would not, and could not, be performed within the year, even though it was possible of performance within that time, it comes within the inhibition of the Statute. (Citations omitted) We are aware of the general rule to the effect that, where it is possible for a contract to be fully performed within a year, it will not be construed as coming with the inhibition of the statute, and which rule is recognized and applied by courts generally, including this one, to such an extent as to not require a reference to the cases. But, while such is the general rule, particular as to contracts which have for their purpose the accomplishment of a finished piece of work, and which might be finished within the year, yet some courts, including this one, have qualified it as to contracts not for a finished job, and having no fixed time for performance, and where from "the object to be accomplished in the surrounding circumstances it clearly and irresistibly appears that the parties intended that the contract should extend over a year," in which case the contract will be treated as one not to be performed within that time, as coming within the statute. 190 S.W.2d at 860 - 861.

The Court in Williamson noted that the parties there contemplated that it would require several years to perform the agreement. The only testimony from the Plaintiff in Williamson confirmed that fact. The Court in Williamson noted the foregoing to the effect that the evidence from both parties showed that it was not contemplated by either of them that the contract was to be performed within a year. The Williamson Court held that the Statute of Frauds was applicable and barred the oral agreement in that case. This Court feels that this case is applicable to the case at bar.

Further research on the issue supports this conclusion. 72 Am Jur 2d STATUTE OF FRAUDS § 7 at page 71 provides in part as follows:

According to many decisions, in order for this provision of the Statute to apply (“to be performed within one year”), it must appear that the parties intended, when they made the contract, that it should not be performed within the year. In other words, that a contract cannot be performed within a year means not a natural or physical impossibility, but an impossibility by the terms of the contract itself, or by the understanding and intention of the parties as shown by the contract. Some Courts say that the Statute is only meant to include an agreement which by a fair and reasonable interpretation of the term used by the parties, and in view of all of the circumstances existing at the time, does not admit of its performance according to its language and intention within a year from the time of its making. A contract is within the Statute, as a general rule, if the time for the full performance of the contract exceeds a year, although the excess is ever so little. (Emphasis added)

In the case at bar, it was clearly contemplated by the parties in the ultimate agreement reached by Cindy and Mel on June 25, 2001 that the bonus was to be paid over the course of one hundred seven months, which clearly exceeds one year from the time of its making on June 25, 2001. This was again confirmed by the draft Agreement prepared by Attorney Moseley for Cindy, by her Amended Answer to Interrogatory No. 8 and by the sworn testimony of Cindy and Steve at trial. The Court therefore concludes that it is immaterial that Mel had the financial resources to pay off the balance of the bonus amount with one year of its making because that was never the agreement or contemplation of the parties by any testimony or evidence, even in the light most favorable to Cindy.

The Court also finds that the sister state decision of Goldstein v. Abco Construction Company, Inc., 334 So. 2d 281 (Fla. App. 1976) is on point with its facts compared to the case at bar. In the Florida case, there was an oral agreement for a corporate officer to personally pay the corporation’s promissory note in monthly installments. Considering the amount of the note and

the minimal monthly payments made by the corporate officer consistent with the oral agreement, the Florida Court held that it was apparent that the monthly installments were such that approximately eight years would be required for such payments to discharge the principal of the obligation, aside from interest. The Florida Court held that its Statute of Frauds, similar to Kentucky's, barred the enforcement of that oral promise since it could not be completed, within the contemplation of the parties, within one year. This is very similar to the case at bar and is consistent with the Kentucky decisions and Hornbook law.

The Court also notes Kentucky Utilities Co. v. Hurst, 207 Ky. 448, 269 S.W. 525 (1925) where the Court was considering a special oral contract between certain parties for the furnishing of water. That Court noted, that under the circumstances and the contemplation of the parties at the time, the oral agreement was not to be performed within one year from the time of its making, and was therefore barred by subsection (7) of the Statute of Frauds of Kentucky. That Court also noted that it was important that from the terms of the contract itself and its nature in the situation of the parties, that it was intended and contemplated by both parties, at the time the oral contract was entered into, that it would not be performed by both parties within the year, thereby invoking the Statute of Frauds.

The Court does not accept the strained interpretation argued by Cindy of United Parcel Service Co. v. Rickert, 996 S.W.2d 464 (Ky. 1999) and Johnson v. Kentucky Youth Research Center, Inc., 682 S.W.2d 799 (1985). Cindy argues that these cases stand for the proposition that if the agreement could possibly have been performed within one year of its making, that the agreement is not barred by the Statute of Frauds. However, the Court reads those cases as standing for the proposition that there was no agreement reached or contemplated between those

parties that the obligations of each party would extend beyond one year. In Rickert, UPS could have hired Rickert as a pilot because all conditions precedent to Rickert being hired were satisfied well within one year. Richert could have been hired, pursuant to the oral agreement with UPS, within one year of the oral agreement. The agreement in Kentucky Youth Research Center, Inc. involved the production of a documentary to begin by a date certain and to be completed no later than a date fifteen months in the future. Clearly, the documentary could have been filmed within one year of the starting date and was therefore not within the Statute of Frauds.

In the case at bar, this was not an agreement whereby Mel was to pay a lump sum. Mel rejected that initial proposal. The undisputed agreement and contemplation of the parties was that the bonus was to be paid in a fixed amount in monthly installments over the course of one hundred seven months. Similarly, Cindy argues that Audiovox Corporation v. Moody, 737 S.W.2d 468 (Ky. App. 1987) takes the case at bar out of the Statute of Frauds. However, the Court in Moody held that under the facts of that case, well within one year from the assumed contract, the contingency which would have triggered its performance occurred. Therefore, the agreement could have been performed within one year under the contemplation of the parties. Since either performance or breach of the agreement could have occurred within one year of the oral understanding of the parties in Moody, the Statute of Frauds did not bar the claim. Once again, in the case at bar, the Court finds that the clear agreement of Cindy and Mel was that the bonus would not be a lump sum payment but would be paid in monthly installments for a period of one hundred seven (107) months. This agreement of the parties renders the Moody case inapplicable.

On a similar note, the Court rejects Cindy's argument that Fisher v. Long, 294 Ky. 751, 172 S.W.2d 545 (1943) is applicable to the case at bar. In Long, there was a full understanding between the parties with one final term missing. Without any additional discussion or agreement, that final term could be easily filled in based on known facts and agreements of the parties. In the case at bar, the amount of any bonus to be paid by Mel to Cindy was uncertain and may not even have come to fruition. This was no simple mathematical computation based on known facts as was the case in Long. Therefore, the Court rejects Cindy's argument that Fisher v. Long supports her claim against Mel.

On the basis of all the foregoing, the Court, after giving Cindy her uninhibited day in court, is persuaded that the undisputed testimony at trial from Cindy, Steve and their Attorney, Mark Moseley, a review of Attorney Moseley's draft Agreement and Cindy's Amended Answer to Interrogatory No. 8 conclusively established that it was the agreement of the parties and contemplated by Cindy and Mel on June 25, 2001 that the bonus to be paid was to be in monthly installments at \$10,000.00 per month for a total of one hundred seven (107) months. The initial proposal by Cindy and Steve that the bonus was to be a lump sum payment was absolutely and unequivocally rejected by Mel. It was abandoned by Cindy and Steve in the course of the discussions on June 25, 2001 and was definitely not part of the agreement between the parties based on the sworn and undisputed testimony of Cindy and Steve at trial. Accordingly, since it was never contemplated by the parties that the oral agreement was to be performed within one year of its making (June 25, 2001) and because Cindy produced no writing signed by Mel agreeing to the oral promise, the conclusion is inescapable that Kentucky's Statute of Frauds codified at KRS 371.010(7) bars Cindy's claim against Mel in all respects.

The Court is aware of the apparent harshness of this ruling. The trial jury found, and the Court heard Mel state on the tape recording, that he agreed to make monthly payments to Cindy which would eventually total over One Million Dollars. Honoring that oral agreement would be the "moral" and "right" thing for Mel to do. However, this Court is obligated by Oath of Office and Kentucky law, to consider cases based on the facts presented and the applicable law. It was undisputed testimony from Cindy, Steve, and their Attorney, Mark Moseley, that the agreement was a bonus to be paid monthly over one hundred seven (107) months. The Court has applied Kentucky law to those facts. The end result may not seem "fair" to Cindy after the jury verdict in her favor. The Court has tried diligently to consider all arguments of Counsel, has read and re-read the statutes and case authorities cited, has conducted its own independent legal research on the issues presented and has rendered this Opinion in accordance with those legal authorities.

The Statute of Frauds, by its own terms, can be considered "harsh" in that it will bar oral agreements between parties under certain conditions. That is simply the nature of the beast. If the Statute of Frauds, codified at KRS 371.010(7), does not apply to the undisputed testimony in the case at bar, it would be hard to imagine any case where it would apply.

Accordingly, IT IS ORDERED AND ADJUDGED that the Motion of the Defendant for Judgment Notwithstanding the Verdict is GRANTED. The Motion of the Defendant for a New Trial is DENIED as moot. The JUDGMENT entered by the Court on or about February 9, 2006 in favor of the Plaintiff is hereby SET ASIDE.

Based on the foregoing, IT IS HEREBY ORDERED AND ADJUDGED as follows:

(1) That the Complaint and any and all claims of the Plaintiff against the Defendant in the within cause of action are hereby DISMISSED WITH PREJUDICE with the Defendant to

recover his costs herein expended pursuant to Kentucky law;

(2) That this JUDGMENT in favor of the Defendant is a final adjudication of all claims of both parties and is therefore final and appealable pursuant to CR 54.02.

Dated this 30 day of March, 2006


HON. JAMES D. ISHMAEL, JR.

This is to certify that a true and correct copy of the foregoing Opinion and Order was served upon the following parties via First Class Mail this 30 day of March, 2006:

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