STATE OF MICHIGAN

COURT OF APPEALS

RUTILA PROPERTIES, LLC, Plaintiff-Appellant,	UNPUBLISHED February 10, 2011
v	No. 294907 Tuscola Circuit Court
THUMB CELLULAR, LLC, Defendant-Appellee.	LC No. 08-025131-CK

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition in favor of defendant and an order denying reconsideration or relief from judgment. This case concerns the statute of frauds and the effect of newly discovered evidence at a motion for reconsideration. We affirm.

Plaintiff is the owner of Caro Plaza, a shopping center with retail stores. In 1997, the parties or their predecessors in interest entered into a lease agreement, under which defendant leased one of the retail units. In 2002, the parties entered into a five-year renewal and addendum to the 1997 lease. At issue is a purported new, ten-year lease that plaintiff contends the parties entered into in 2003. Defendant denies entering into the 2003 lease. In 2008, defendant vacated the premises, allegedly in violation of the terms of the 2003 lease, but also allegedly in full compliance with the terms of the 2002 lease. Plaintiff commenced this suit for breach of contract.[1]

The critical fact in this matter is that plaintiff provided a copy of the 2003 lease that had been signed—and the signature witnessed and notarized—by defendant's representative. However, the 2003 lease was not signed by any representative of *plaintiff*. Defendant admitted that its manager's signature did appear on the 2003 lease, but plaintiff admitted that none of its representatives ever signed a copy of the 2003 lease, possessed a copy of the 2003 lease signed by both a representative of plaintiff and a representative of defendant, or gave a representative of defendant a copy of the 2003 lease signed by both a representative of plaintiff and a

[1] Defendant's counterclaim was dismissed by stipulation and is not relevant to this appeal.

representative of defendant. The trial court agreed with defendant that the statute of frauds required plaintiff, the lessor, to sign the lease, and it therefore granted summary disposition in defendant's favor.

The trial court permitted plaintiff an expanded period of time within which to move for reconsideration, limited to the legal question of whether the statute of frauds really did require the lessor's signature. Plaintiff did not provide new legal argument, but did claim to have a newly discovered fully-executed copy of the 2003 lease, and it attached a few pages of it. Plaintiff had apparently dismantled its copy of the 2003 lease and put the relevant parts in a file associated with the major tenant at Caro Plaza pursuant to a filing system apparently intended to reduce file volume. The trial court denied reconsideration because plaintiff had not provided any new law, and it denied relief from judgment because plaintiff had not exercised due diligence in its earlier search for the 2003 lease.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Questions of law, including interpretation of statutes, are reviewed de novo. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003). The statute of frauds is technically a number of different statutes. In relevant part, MCL 566.106 states:

> No estate or interest in lands, other than leases for a term not exceeding 1 year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by some person thereunto by him lawfully authorized by writing.

And MCL 566.108 provides in relevant part:

> Every contract for the leasing for a longer period than 1 year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing…

Both of these provisions are identical to their predecessor provisions as originally enacted in this State. See RS 1846, Ch 80, §§ 6, 8.[2] Defendant correctly observes that the above language has remained the same in all subsequent statutory compilations.

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[2] The versions in the 1835 Revised Statutes have a few very minor differences. See RS 1835, Part 2, Title VI, Ch 1, §§ 6, 8.

The plain language of these statutory provisions supports defendant's position. Under MCL 566.106, "the party creating, granting, assigning, surrendering or declaring" some interest in land must "subscribe" to the conveyance in writing. And under MCL 566.106, a lease like the one at issue here—for more than a year—must be in writing and "signed by the party by whom the lease or sale is to be made." In other words, the lease must be signed by the lessor or landlord. Plaintiff would be the lessor under the 2003 lease.

In *Cheesebrough v Pingree*, 72 Mich 438; 40 NW 747 (1888), our Supreme Court reached a similar result. In that case, there were two copies of a lease agreement, both of which were signed by the tenants/defendants; plaintiff landlord did not sign the copy left with defendant and only informed defendant about the second copy, which plaintiff did sign, at the time of trial. *Cheesebrough*, 72 Mich at 440-445. Defendant was already in possession of the premises when the lease was created. *Id*. at 445. The lease was void, even though it was signed by the party to be charged, partly because of the above provisions of the statute of frauds, and partly because the absence of the landlord's signature meant the tenant could not have enforced it against the landlord. *Id*. at 444-445. *Cheesebrough* is still binding case law.

Additionally, in *Cook v Bell*, 18 Mich 387 (1869), our Supreme Court explained that the contract to sell lands at issue in that case "would have been absolutely void at law, unless in writing, and signed by [the plaintiff]." *Cook*, 18 Mich at 393. In *Starr v Holck*, 318 Mich 452; 28 NW2d 289 (1947), the landlord/defendant had signed a lease and it was unclear whether the tenants/plaintiffs had, but our Supreme Court enforced the lease against the landlord. Our Supreme Court explained that under the statute of frauds, "a lease of land for a longer period than one year is void unless in writing and signed by the lessor or lessors[, s]uch requirement is not imposed on lessees." *Starr*, 318 Mich at 467. In a more recent case that admittedly "at its heart, [was] not a statute of frauds case," this Court reiterated that pursuant to MCL 566.106 and 566.108, a contract for the sale of land must be signed by the seller or an authorized representative of the seller. *Zurcher v Herveat*, 238 Mich App 267, 277, 292; 605 NW2d 329 (1999).

Plaintiff correctly points out the *general* rule that an agreement that cannot be performed within a year mist be signed "by the party to be charged." MCL 566.132(1). However, a more specific statutory provision controls a more general provision. *Jones v Enertel, Inc*, 467 Mich 266, 270; 650 NW2d 334 (2002). But more importantly, statutory provisions are to be read together and harmonized to the extent possible. *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). The requirements of MCL 566.106 and 566.108 must be applied *in addition to* the general rules in MCL 566.132(1). Therefore, the statute of frauds requires a lease for more than a year to be signed by the lessor *and* by the party to be charged, unless they are the same entity. If, for example, plaintiff had signed the 2003 lease but defendant had not, plaintiff would be equally unable to enforce it. *Starr* is distinguishable on this last point because there, the tenant, who may or may not have signed the lease, was the party seeking to enforce it against the landlord, who had. *Starr*, 318 Mich at 467.

Plaintiff argues that the doctrine of partial performance should remove this case from the statute of frauds, but the partial performance doctrine has not been applied to contracts that cannot be performed within a year, like the 2003 lease. *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 540-541; 473 NW2d 652 (1991). Furthermore, the gravamen of plaintiff's assertion is not

that there was partial performance, but rather that defendant impliedly recognized the validity of the 2003 lease by agreeing to a particular rent increase under the terms of the 2003 lease. Defendant correctly points out that the relevant provisions in the 2003 lease are identical to the same provisions in the 1997 lease and 2002 renewal. Plaintiff has not shown that defendant did anything unique to the 2003 lease upon which plaintiff could have relied.

The trial court therefore correctly granted summary disposition in favor of defendant.

Plaintiff argues that the trial court abused its discretion by denying its motion for reconsideration and for other relief. We disagree. A trial court's denial of a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). A trial court's decision on a motion for relief from judgment or an order is also reviewed for an abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). A trial court generally not abuse its discretion by denying reconsideration based on facts or law that could have been presented to the trial court prior to its original decision on the issue. *Charbeneau v Wayne Co Gen Hosp*, 158 Mich App 730, 733; 405 NW2d 151 (1987).

Because a trial court considers the evidence before it at the time when ruling on a motion for summary disposition, a motion to reconsider the trial court's decision under MCR 2.119(F) must likewise be based on the same record. See *Maiden*, 461 Mich at 126 n 9. The trial court's grant of summary disposition in defendant's favor reached the correct legal conclusion on the basis of the record available at the time. The trial court did not abuse its discretion by declining to reverse its decision on the basis of newly-discovered evidence.

Plaintiff also requested relief under MCR 2.612(C)(1)(b), under which the trial court may relieve a party of a final[3] judgment or order on the basis of new evidence "which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B)."

Plaintiff conceded that after Bruce Rutila discovered parts of the lease in a file for a different tenant, he now recalled that he had deliberately dismantled the lease to "maintain a less voluminous copy." Plaintiff offered the explanation that "Mr. Rutila had apparently placed the signed copy of the Lease Agreement in [the other] file so that he could have all of the pertinent documents concerning the shopping center in the same location." It appears that plaintiff was not a victim to, say, a temporary employee mysteriously misfiling a document, but rather to its own intentional filing system of which it could not then keep track.

We agree with plaintiff in principle that *just* because something ultimately is found should not necessarily mean that it should have been found earlier by exercising due diligence. But the trial court did not so hold. Rather, it appears that plaintiff's fully-executed copy of the

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[3] The trial court appears to have disregarded the applicability of that rule to "final" judgments or orders, which is not unreasonable given the parties' stipulation to dismiss the counterclaim; for all *practical* intents and purposes, the trial court's grant of summary disposition ended the case.

2003 lease, assuming it is bona fide, was exactly where it was supposed to be all along, and plaintiff simply did not look there. We find no abuse of discretion in the trial court's finding that plaintiff did not exercise due diligence, and therefore the trial court did not abuse its discretion by denying plaintiff's motion for relief from judgment.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause