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IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC13-2416
Lower Tribunal Nos.: 5D12-1823
08-CA-453-15-W

HOWARD BROWNING,

Petitioner,

vs.

LYNN ANNE POIRIER,

Respondent.

ON DISCRETIONARY REVIEW OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER HOWARD BROWNING

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II. PRELIMINARY STATEMENT

References to the record on appeal shall be indicated by (Volume, Page) as **(V. ____, P. ____**). An Appendix was also filed with the filing of this Initial Brief. References to the Appendix shall be indicated as **(Appendix T. ____, P. ____).** All references to Appellee's Answer Brief shall appear as **(Appellee's Answer Brief at p. ____)**.

III. ARGUMENTS IN REPLY TO APPELLEE'S ANSWER BRIEF

A. Pursuant To Both The General Rule and Qualifying Rule, As Set Forth In *Yates v. Ball*, The Certified Question By The Fifth District Court of Appeal Should Be Answered In The Negative.

In the instant case, the evidence clearly shows that no time was expressly agreed to regarding the complete performance of the contract. Petitioner's claims as against Respondent were based upon Petitioner's contention that the parties entered into an agreement to purchase lottery tickets together and to divide the winnings in the event a winning ticket(s) was purchased **(V. XVIII, P. 73**). Specifically, Petitioner testified at trial that the parties entered into an agreement to purchase lottery tickets together and that if they won, they would split the money from the winnings **(V. XVIII, P. 73**). The substance of the oral contract itself, based upon the evidence of the instant case, made no mention of duration or intent that that oral contract last for any specific time period. This fact is not contradicted.

In Appellee's own "Evidence Presented At Trial" section of Appellee's Answer Brief **(Appellee's Answer Brief at pp. 6-12)**, the only reference to evidence arguably presented on the issue of Appellant's intent regarding the duration of the oral contract is set forth in Appellee's Answer Brief at pp. 6-7, where Appellee states that "Browning testified that the oral contract was to last as long as he and Poirier "was [sic] together"" and that "Browning further testified that he planned on staying with Poirier." **(Appellee's Answer Brief at pp. 6-7**) (citing to V. 18, p. 146 and V. 18, pp. 183-4 respectively). It must be noted that this evidence was not as to the express terms of the oral contract, but was rather testimony regarding Appellant's own desires regarding the parties' relationship with one another. Appellee, in her pleadings and at the trial, denied the existence of any oral contract. From this evidence, the Trial Judge concluded that the parties (plural) *intended* the agreement to last for longer than a year.

This Court in *Yates*, on the very issue of the applicability of the statute of frauds to an oral agreement of this kind, set forth its general rule and a qualifying rule. This Court held as follows:

> "In other words, to make a parol contract void, it must be apparent that it was the understanding of the parties that it was not to be performed within a year from the time it was made. This holding is supported by Peter v. Compton, Skinner 353, 90 Eng. Rep. 157, decided in King's Bench by Lord Holt.

> **When, as in this case, no definite time was fixed by the parties for the performance of their agreement and there is nothing in its terms to show that it could not be performed within a year according to its intent and the understanding of the parties, it should not be construed as being within the statute of frauds**. 25 R.C.L. 456, and cases cited.
>
> The general rule so stated is subject to the qualifying rule that when no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds, though it cannot be said that there is any impossibility preventing its performance within a year. 25 R.C.L. 458."[1]

Other than the very limited testimony cited to by Appellee, as set forth above, regarding Appellant's indication that the oral contract would last as long as the parties were together, and that Appellant intended to stay with Appellee, there is no further arguable evidence on the duration of the oral contract. Applying the rule of law set forth in *Yates*, this case falls squarely within the general rule, in that no definite time was fixed by the parties for the performance of their agreement, there is nothing in the terms of the oral contract to show that it could not have been performed within a year according to its intent and the understanding of the parties. In applying the general rule from *Yates*, Appellant contends that the words "its intent" refers to the express provisions of the oral contract. This is based upon the

[1] *Yates v. Ball*, 132 Fla. 132, 139, 181 So. 341 (Fla. 1937).

use of the word "its" as opposed to the "parties'" intent. The "understanding of the parties" also refers back to the express provisions of the oral contract, and is not used interchangeably with the word "intent". Based upon the foregoing, and to the extent that this Court applies the rule of law as set forth in the *Yates* case, Appellant contends that the facts of the instant case fall squarely within the general rule, and that the instant oral contract does not fall within the statute of frauds.

Furthermore, even if this Court applied the qualifying rule to the instant case, the oral contract at issue would still not fall within the statute of frauds. The qualifying rule states that "when no time is agreed on for the complete performance of the contract, if from the object to be accomplished by it and the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds." In this case it is true that no specific time was agreed upon for completion of performance. However, from the object to be accomplished by it (i.e. the purchase of lottery tickets and splitting of proceeds) it does not clearly appear that the parties intended the oral contract to last more than one year. There is nothing within the express terms of the oral contract that would support such a finding. The next aspect of the qualifying rule states that "if from . . . the surrounding circumstances, it clearly appears that the parties intended that it should extend for a longer period than a year, it is within the statute of frauds." Again, the **only** testimony on this issue

regarding "surrounding circumstances" was the testimony of Appellant to the extent that "Browning testified that the oral contract was to last as long as he and Poirier "was [sic] together"" and that "Browning further testified that he planned on staying with Poirier." **(Appellee's Answer Brief at pp. 6-7**) (citing to V. 18, p. 146 and V. 18, pp. 183-4 respectively). It can hardly be said that such testimony "clearly appears that the parties intended that it should extend for a longer period than a year".

In sum, there is nothing within the evidence regarding the express terms of the oral contract at issue that establishes any intent that the contract would last for more than one year. Furthermore, there is nothing from the object of the oral contract at issue (i.e. the purchase of lottery tickets and splitting of proceeds) that would make it clearly appear that the parties intended the oral contract to last for more than one year. Finally, there is nothing from the surrounding circumstances that would make it clearly appear that the parties intended the oral contract to last for more than one year. Based upon the foregoing, and regardless of whether this Court finds that the oral contract at issue falls within the general rule or the qualifying rule as set forth in *Yates v. Ball*, the contract at issue does not fall within the statute of frauds.

B. The Contract At Issue In The Instant Case Does Not Fall Within The Statute Of Frauds Based Upon *Berger v. Jackson* and *Schenkel v. Atlantic Nat'l Bank of Jacksonville*.

Appellee contends that the cases of *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1st DCA 1962) and *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1949), both of which held that agreements to provide services during one's lifetime to be paid upon one's death do not fall within the statute of frauds "since death is uncertain, the contract could have been terminated prior to the expiration of one year." *Schenkel* at p. 330; *See Berger* at p. 267. For obvious reasons, Appellee attempts to avoid having to argue this issue, as the case law does not support Appellee's position. To that end, Appellee refuses to engage in argument regarding the holdings by simply contending that the facts in both of these cases cannot be adequately identified. Despite Appellee's contention, the facts of both of the cases are stated, and the legal holdings in both cases are equally clear.[2]

[2] In the case of *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1st DCA 1962), the issue of performance of an oral agreement within 1 year was addressed as it related to personal contracts between individuals and the obvious possibility of death as a means of terminating a contract within a year. In *Schenkel*, the Court held that "[w]ith reference to the sixth defense (that the first count is founded upon an oral contract not intended to be performed within one year from the date thereof, which contract was not in writing as required by law-Section 725.01, *Florida Statutes*, F.S.A.), the Petitioner contends that the Statute of Frauds, requiring contracts 'not to be performed, within the space of one year' to be in writing, is not applicable in the instant case because, since death is uncertain, the contract could have been terminated prior to the expiration of one year. This contention is supported by the decision of the Supreme Court of Florida in *Berger v. Jackson*, 156 Fla. 251, 23 So.2d 265 (1949), and, again, we hold that the Circuit Court erred in granting a new trial on the ground among others, that it had erred in striking the sixth defense."

Obviously, in the *Schenkel* case, it was the intent and desire of all participants that they would live for more than a year. Despite that obvious intent and desire, the Court in *Schenkel* and this Court in *Berger* held that, due to the uncertainty of life and the possibility of intervening death, the contract did not fall within the statute of frauds. Likewise, in the instant case, at issue is an alleged oral agreement between two individual parties, which obviously could have been completed within 1 year based upon the fact that either party could have died during the year, their romantic relationship could have terminated during the year, they could have stopped playing the lottery, or there could have been countless reasons why the agreement could have been terminated. As in the *Schenkel* case, the possibility of an intervening death of either party imposes upon the agreement the possibility that the agreement could have been performed within the period of one year.

C. Appellee's Contention That The Second District Court of Appeal Decision In *Gulf Solar, Inc. v. Westfall* Was Based Upon The "Majority" Approach Is Without Merit.

Appellee contends that there is no conflict between the decision in *Gulf Solar, Inc. v. Westfall*, 447 So. 2d 363 (Fla. 2d DCA 1984) and the instant case, as the Second District Court of Appeal in *Gulf Solar* did not follow this Court's decision in Yates v. Ball but instead followed the "majority" approach (Appellee's Answer Brief at p. 46). Such an argument is simply without merit. It is clear from

the *Gulf Solar* case that the Second District Court of Appeal did apply the standards set forth in the *Yates* case. In fact, there are repeated references to the *Yates* case within the *Gulf Solar* case.[3] Contrary to Appellee's contention, the Second District Court of Appeal properly applied the general rule in the *Yates* case, and makes an appropriate finding that, despite the fact that "Appellee [Westfall] stated in deposition that it was his intention for the employment relationship with Gulf Solar to continue for more than one year" he did state in an affidavit that "his services were capable of being performed and were performed within the space of one year." As a result, the Court in *Gulf Solar* held that "the trial court accurately stated that 'all employees are hired probably indefinitely as long as they do the job. They go on forever, maybe twenty years, but that does not take it out of (sic) the statute of frauds.'" The Second District Court of Appeal held in Gulf Solar that

[3] "The appellants have argued that if from the object to be accomplished and the surrounding circumstances it clearly appears that the parties intended for performance to extend beyond one year, enforcement of the agreement is barred by the statute of frauds. *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (1938), is cited as authority." *Gulf Solar* at 365.

"The oral agreement involved in this case is not barred by the statute of frauds. *See Yates v. Ball, supra*. *See also Hiatt v. Vaughn*, 430 So.2d 597 (Fla. 4th DCA 1983); *Venditti-Siravo, Inc. v. City of Hollywood, Florida*, 418 So.2d 1251 (Fla. 4th DCA 1982); *Gerry v. Antonio*, 409 So.2d 1181 (Fla. 4th DCA 1982); *Monogram Products, Inc. v. Berkowitz*, 392 So.2d 1353 (Fla. 2d DCA 1980); *W.B.D., Inc. v. Howard Johnson Co.*, 382 So.2d 1323 (Fla. 1st DCA),*petition for review denied*, 388 So.2d 1114 (Fla. 1980). We, therefore, affirm the decision below as to the issues raised by the appellants." *Gulf Solar* at 366.

"[n]o error was committed by the denial of the motion for summary judgment. While the parties may have expected Westfall to remain with Gulf Solar for some unknown period of time, Gulf Solar had no obligation to retain Westfall's services and Westfall had no obligation to remain in Gulf Solar's employment for any definite time period. Apparently, Westfall would be retained by Gulf Solar for as long as his performance merited his retention in the view of Gulf Solar." *Gulf Solar* at p. 365.

The object of the respective oral contracts aside, the facts of the *Gulf Solar* case and the instant case are the same. As the Second District Court of Appeal in the *Gulf Solar* case applied the general rule from *Yates* and allowed the oral contract to fall outside of the statute of frauds, such decision is in direct conflict with the decision in the instant case.

D. Appellant's Citation to *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1st DCA 1962) Was Inadvertently Cited As A Florida Supreme Court Case.

Appellant's counsel inadvertently cited to the case of *Schenkel v. Atlantic Nat. Bank of Jacksonville*, 141 So.2d 327 (Fla. 1st DCA 1962) in his Appellant's Initial Brief as Florida Supreme Court case. This was in error, and the proper citation is included herein.

IV. CONCLUSION AND REQUEST FOR RELIEF

For the reasons stated above, the Court should reverse the Opinion of the Fifth District Court of Appeal, answer the certified question in the negative, and resolve the existing conflict between the districts as set forth herein.

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V. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) and is submitted in Times New Roman 14 point font.

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VI. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail to msessums@sessumspa.com and U.S. mail to Mark A. Sessums, Esq. at 2212 South Florida Avenue, Lakeland, Florida 33803 on this 12th day of September 2014.

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