

Affirmed and Opinion filed December 2, 1999.



In The

Fourteenth Court of Appeals

NO. 14-98-01102-CV

TRIAD HOME RENOVATORS, INC., Appellant

V.

COMERICA BANK-TEXAS, Appellee

**On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 96-56464**

OPINION

Triad Home Renovators appeals from the dismissal of its suit after it failed to amend its pleadings to state a cause of action. Triad sued appellee Comerica Bank-Texas for damages based on the breach of an oral contract to pay for completed construction. Appellant raises two issues on appeal. We affirm.

In 1996, Platter, Inc., a company interested in entering the restaurant business, secured a lease on land containing a suitable building to be renovated and repaired. Platter next secured a loan from Comerica to finance the renovation project and hired Triad to perform the necessary renovations. Triad contacted Comerica to insure that the funds for the project were available and set aside. After receiving confirmation

that these funds were indeed ready, Triad began renovating the building. It received payments from the fund at various intervals throughout the construction process by presenting certificates of payment to either Comerica or Platter.

Shortly after construction began, Platter began to have financial problems, defaulted on the lease, and filed for bankruptcy. After receiving payment on several prior occasions, Triad presented a further certificate and asked for payment. Comerica, however, refused to pay and informed Triad that it had applied the funds to pay down the balance on the loan to Platter.

Triad filed suit alleging that Comerica was estopped from denying the existence and validity of a contract to pay Triad upon presentation of the certificates based on the theory of promissory estoppel. Comerica answered, affirmatively asserting the statute of frauds as a defense. Comerica later filed special exceptions to Triad's allegations of promissory estoppel, which were sustained by the trial court. These special exceptions showed that the "agreement," if one existed, between Comerica and Triad was a promise to answer for the debt, default, or miscarriage of Platter, and therefore, must be in writing under the statute of frauds. TEX. BUS. & COM. CODE ANN § 26.01 (Vernon 1987). Comerica also asserted that any agreement existing between Triad and Comerica was a loan agreement requiring a writing under TEX. BUS. & COM. CODE ANN § 26.02 (Vernon 1987). Triad filed an amended petition, in which it alleged that the promise was not a surety agreement, but was a promise to "set aside funds." The trial court dismissed Triad's case.

On appeal, Triad asserts that the trial court erred by sustaining Comerica's special exceptions and by dismissing Triad's claim. We disagree.

When reviewing the grant of special exceptions, we take as true the factual allegations in the plaintiff's pleading and review the trial court's rulings under an abuse of discretion standard. *Thompson v. El Centro Del Barrio*, 905 S.W.2d 356, 358 (Tex. App.–San Antonio 1995, writ denied). An abuse of discretion is found if the trial court fails to correctly analyze or apply the law. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992); *In re Kimball Hill Homes Texas, Inc.*, 969 S.W.2d 522, 524 (Tex. App–Houston[14th Dist.] 1998, no pet.).

If the trial court sustains special exceptions, the pleader can either replead or refuse to replead and test the validity of its pleadings on appeal. *McCamey v. Kinnear*, 484 S.W.2d 150, 152 (Tex. Civ. App.–Beaumont 1972, writ ref'd n.r.e.). Here, appellant decided to choose the latter route.

The paragraph of appellant's amended petition alleging promissory estoppel against Comerica reads as follows:

"Triad received a promise from Comerica that Comerica would set aside certain sums of monies for construction costs and verified for Triad that substantial funds were available to pay for its costs of construction. As a result of Comerica's promises and assurances, and in reliance upon same, Triad proceeded with improvements to the subject property. . . . Comerica refused to honor its promise to pay Triad for work performed on the property."

This same language is present in Triad's original petition, as well. In its amended petition, however, appellant also alleged:

"The facts herein show the promise was made by Comerica to set aside funds payable directly to Triad in exchange for improvements he was making on the subject property. The promise was not to answer for the debt of another, but was a promise to set aside funds specifically for the purpose of paying Triad directly from the proceeds of a loan made to [Platter] to finance said improvement."

Even with this language, there appears to be a conflict as to exactly what type of agreement Triad is alleging, since Comerica still contends that Triad's pleadings describe a surety agreement, and Triad contends the agreement between Triad and Comerica was entirely separate, relying on *Fretz Constr. Co. v. Southern Nat. Bank*, 626 S.W.2d 478 (Tex. 1982). Though Triad contends that the statute of frauds is inapplicable because their claim is not based on an agreement to set aside funds rather than a surety agreement, this claim is a distinction without a difference.

In *Fretz*, Fretz Construction Company was approached by another company, Aqua-Con, which asked Fretz to build an office building. 626 S.W.2d at 479. Because of problems obtaining financing, Fretz and its surety sought assurances from the bank. *Id.* The bank's vice president orally informed Fretz and its surety not only that the funds would be set aside, but also that no other costs or fees would be paid out of that fund. *Id.* at 479-80. It also sent a letter expressing these same assurances to Fretz's surety,

who provided Fretz with a copy. *Id.* at 480. When Fretz went to the bank for payment, it discovered that no funds had been set aside and fees and other costs had been paid out of the fund, in direct contravention of the letter agreement. *Id.* at 481. Fretz successfully pursued a promissory estoppel claim at trial. *Id.* at 480.

Here, as opposed to *Fretz*, Comerica did everything it told Triad it would do. It set the funds aside. Furthermore, *Fretz* involved a case where a writing was present; the statute of frauds was never raised. Finally, the bank in *Fretz* promised to do far more than set funds aside, which is all Comerica agreed to do in this case. We do not find *Fretz* controlling in this case.

There are three elements to promissory estoppel: 1) a promise; 2) foreseeability by the promisor that the promisee would rely on that promise; and 3) substantial reliance by the promisee to his detriment. *Allied Vista, Inc. v. Holt*, 987 S.W.2d 138, 141 (Tex. App.–Houston[14th Dist.] 1999, no pet. h.) (citing *English v. Fischer*, 660 S.W.2d 521, 524 (Tex.1983)). Promissory estoppel is a narrow exception to the defense of the statute of frauds, operating to preclude a statute of frauds defense only in two situations. *See Nagle v. Nagle*, 633 S.W.2d 796, 800 (Tex. 1982); *Collins v. Allied Pharmacy Mgt.*, 871 S.W.2d 929, 936 (Tex. App.–Houston [14th Dist.] 1994, no writ). This exception is available only where the promise to be enforced is to sign a written agreement complying with the statute or where there is reliance on a misrepresentation that the statute has been satisfied. *Nagle*, 633 S.W.2d at 800; *Collins*, 871 S.W.2d at 936-37. Based on these premises, Comerica contends that even if all of the facts alleged by Triad are taken as true, it still has failed to state a cause of action for promissory estoppel. We agree.

Special exceptions must be based on one or more of three propositions—1) that no legal rule justifies a recovery on a claim of the type alleged; 2) that, though there is a legal rule which might be applicable, the petition omits one or more allegations essential to bring plaintiff's claim within its scope; or 3) that, though there is a legal rule which might be applicable, the petition shows on its face facts which negate its application. *Fernandez v. City of El Paso*, 876 S.W.2d 370, 372 (Tex. App.–El Paso 1993, writ denied) (citing MCDONALD, TEXAS CIVIL PRACTICE § 9:25 (1992)).

Triad contends that it has alleged sufficient facts to bring its promissory estoppel claim outside the statute of frauds by showing that Comerica agreed to become primarily liable for Platter's debt. Primary liability is established based on three factors: 1) intent to become primarily liable; 2) consideration; and 3) whether the consideration is given primarily for the benefit of the promisee. *See Smith, Seckman, Reid, Inc. v. Metro Nat. Corp.*, 836 S.W.2d 817, 821 (Tex. App.–Houston [1st Dist.] 1992, no writ). Based on these considerations, we find the appellant has failed to allege sufficient facts to establish Comerica's primary liability on Platter's debt, making the statute of frauds applicable to its claim.

Here, Comerica contends that Triad failed to allege that Comerica promised to sign a written agreement complying with the statute of frauds. Because facts supporting this necessary allegation are missing, Triad has failed to plead promissory estoppel. We believe that this element is necessary to establish at least two essential elements of Triad's claim—a promise and the foreseeability of reliance on that promise.

This allegation implicates the promise element of promissory estoppel, since this is the only promise that falls within the promissory estoppel exception to the statute of frauds. Since Triad has failed to allege the existence of a promise enforceable by promissory estoppel, they have failed to allege an essential element of their claim.

Further, the lack of factual allegations regarding the existence of a promise to enter into a written agreement for payment also goes to the element of foreseeability of reliance. Foreseeability of reliance in promissory estoppel claims must be reasonable. *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 937 (Tex.1972); *El Paso Healthcare Sys., Ltd. v. Piping Rock Corp.*, 939 S.W.2d 695, 698-99 (Tex. App.–El Paso 1997, writ denied). Reliance is not foreseeable in situations such as these where there is no agreement to commit the surety agreement to writing. Accordingly, we overrule appellant's first point of error.

Since appellant's second point of error derives from the trial court's abuse of discretion in sustaining appellee's special exceptions, we need not address it.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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