IN THE COURT OF APPEALS

AT KNOXVILLE

ERNEST LEON FRIZZELL,	)	C/A NO. 03A01-9709-CH-00387
	)	
Plaintiff-Appellee,	)	
	)	
	)	
	)	
v.	)	APPEAL AS OF RIGHT FROM THE
	)	HAMILTON COUNTY CHANCERY COURT
	)	
	)	
	)	
	)	
RAYMOND LEON FRIZZELL,	)	
	)	HONORABLE R. VANN OWENS,
Defendant-Appellant.	)	CHANCELLOR

For Appellant

HOWARD B. BARNWELL, JR.
Chattanooga, Tennessee

For Appellee

ROBERT D. BRADSHAW
B. STEWART JENKINS
Jenkins & Bradshaw, P.C.
Chattanooga, Tennessee

O P I N I O N

AFFIRMED AND REMANDED

Susano, J.

The plaintiff, Ernest Leon Frizzell ("Father"), seeks damages for the breach of an alleged oral agreement with his son, the defendant, Raymond Leon Frizzell ("Son"). Following a bench trial, the court entered judgment against Son for $32,500. Son appealed, raising a number of issues that essentially present three issues for our review:

> 1. Is the claim set forth in the complaint -- based, as it is, on an oral agreement -- barred by the statute of frauds, specifically T.C.A. § 29-2-101(a)(4)[1]?
>
> 2. Does the oral agreement upon which the plaintiff relies violate the parol evidence rule?
>
> 3. Does the evidence preponderate against the trial court's judgment?

I. *Standard of Review*

Our review in this non-jury case is governed by Rule 13(d), T.R.A.P. That rule provides that parties on appeal are entitled to a *de novo* examination of the record of the proceedings below; however, that record comes to us with a presumption of correctness as to the trial court's factual findings that we must honor unless the "preponderance of the evidence is otherwise." ***Id***. *See* ***Union Carbide Corp. v. Huddleston***, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are also reviewed *de novo*, but they are not

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[1]T.C.A. § 29-2-101(a)(4) provides, in pertinent part, as follows:

> (a) No action shall be brought:
>
> * * *
>
> (4) Upon any contract for the sale of lands, tenements, or hereditaments,...

accorded a presumption of correctness. ***Campbell v. Florida Steel Corp***., 919 S.W.2d 26, 35 (Tenn. 1996).

II. *Facts*

Certain facts are not in dispute. Father and Son were involved for a period of time in the operation of a convenience store on a piece of property located on Suck Creek Road in Hamilton County. Father had purchased the property in 1980. Father withdrew from the business, and on April 24, 1987, he conveyed the real estate to Son by warranty deed. On the same day, Son executed a deed of trust with Father as beneficiary to secure the purchase price of $125,000.

On October 15, 1992, Father executed a "Full Release of Lien" with respect to the subject property. That document provides, in pertinent part, as follows:

> The undersigned, [Father], hereby declares that he was the true and lawful holder and owner at the time of payment of the entire indebtedness fully described in and secured by a lien in the Deed of Trust from [Son] to Landmark Title and Trust Company, Inc, Trustee of record in Book 3340, Page 821, in the Register's Office of Hamilton County, Tennessee, to which reference is here made and hereby acknowledge the payment in full of said indebtedness and the satisfaction and discharge of said lien.

Father and Son agree that in 1992 Father was charged with a number of federal gambling violations in the District Court in Hamilton County. They also agree that William Thompson was named as a co-defendant in that prosecution. It is

undisputed that Father approached Son and asked him to put up real property as a bond to secure Father's appearance in the gambling case. However, they strongly disagree with respect to their conversation and subsequent conduct.

Father testified that when he approached Son he assumed that Son could and would use property other than the Suck Creek Road property to secure his release. Instead, according to Father, Son offered to put up the Suck Creek Road property in exchange for Father's release of the deed of trust on that property. Father testified that Son had not then made any payments on the $125,000 debt. Nevertheless, Father agreed to release the deed of trust if Son would agree to pay him half of the sales proceeds when the property was sold, in addition to making his bond. According to Father, Son agreed. On the same day, Father executed the release referred to earlier in this opinion.

Son testified to a different set of facts. He told the court that the entire $125,000 obligation had been paid in full prior to the time Father was charged with the federal gambling violations. He claimed that when Father approached him about making his bond, he agreed to do so provided Father would release the deed of trust securing the then-fully-satisfied obligation. According to him, Father then executed the release, and he, Son, put up the property as a bond for Father's release. He denied that he ever agreed to share the sales proceeds with Father when the property was sold.

Father testified that when he learned that Son had sold the property, he requested that Son pay him half of the proceeds. According to Father, Son originally agreed to do so, but he later changed his mind, noting that if he paid Father, the latter "would just throw the money away." Son denied this conversation.

III. *Trial Court's Rulings*

Pre-trial, the court denied Son's motion to dismiss filed pursuant to Rule 12.02(6), Tenn.R.Civ.P. Son claims in his motion that the oral agreement alleged in the complaint is barred by T.C.A. § 29-2-101(a)(4), the statute of frauds, and that the oral agreement attempts to vary the terms of the release and is thus at odds with the parol evidence rule. The trial court concluded that the oral agreement "could constitute the consideration for the release, and proof of the details does not violate either the statute of frauds or the parol evidence rule."

At the conclusion of the proof, the trial court made findings, including the following:

> The demeanor of the witnesses have contributed to the Court's concern as to the accurateness of much of the testimony. It's a case in which the Court might well be inclined to throw up its hands and say that both parties come into court with unclean hands.
>
> The Court reached the opinion, though, that even though the plaintiff's case carries a lot of doubts, holes, questions, and uncertainties, that nevertheless, the preponderance of the proof supports his version. In other words, the truth is more likely, or more akin, to that as contended by the plaintiff.

> The Court's opinion is similar to what the last witness - the defendant - testified: "There is no telling" what an accurate balance would be between these parties.
>
> The Court in hearing the proof, considers some of the repairs made by the son and finds that there's a balance of $32,500 owing to the father. The Court so finds the plaintiff is entitled to a judgment, plus the court cost in the case.

IV. *Applicable Law*

A.

In this case, Son relies on both the statute of frauds and the parol evidence rule as a legal bar to Father's claim. We have previously noted that "[t]he parol evidence rule and the statute of frauds are separate rules that operate independently from each other." ***GRW Enterprises, Inc. v. Davis***, 797 S.W.2d 606, 611 (Tenn.App. 1990). We will now proceed to examine both rules.

B.

The statute of frauds was "enacted to prevent fraud and perjury." ***Cobble v. Langford***, 230 S.W.2d 194, 196 (Tenn. 1950). *See also* ***Yates v. Skaggs***, 213 S.W.2d 41, 43 (Tenn. 1948). ("The purpose of the statute of frauds is to prevent fraudulent contracts from being established by perjured testimony.")

Subsection 4 of the statute of frauds, T.C.A. § 29-2-101, applies to "the sale of lands, tenements, or hereditaments..." ***Id***. The breadth of the provision is addressed

in the case of ***Lambert v. Home Federal Savings and Loan Association***, 481 S.W.2d 770 (Tenn. 1972):

> A mortgage, or a deed of trust, in its legal aspect is a conveyance of an estate or an interest in land and as such within the meaning of the Statute of Frauds. A mortgage or deed of trust of land cannot be made by parol. A promise to make another the owner of a lien or charge upon land is equivalent to sell him such an interest therein, and is within the statute. 49 Am.Jur. Statute of Frauds, § 197.
>
> Restatement, Contracts, § 195, declares that any interest which the law regards as real estate is within the statute.
>
> And in 76 A.L.R. 574, 579; 49 Am.Jur. Statute of Frauds, § 199 at 526, it is held that an oral contract to mortgage or to give security on real estate is unenforceable.

Id. at 772-73.

The statute of frauds is to be construed so as to accomplish its purpose, ***GRW Enterprises, Inc***., 797 S.W.2d at 611; however, "[t]he courts have...recognized that equitable estoppel is an exception to the statute of frauds." ***Id***.

C.

The parol evidence rule is a rule designed to protect the integrity of written contracts. ***Id***. at 610. Simply stated, it provides that a party to a contract "cannot use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract." ***Id***. A number of exceptions to the parol evidence rule have been recognized in our cases. ***Id***. For example, it has been held that "the parol evidence rule does

not prevent using extraneous evidence to prove that a written contract does not correctly embody the parties' agreement." ***Id***. at 611.

V. *Analysis*

A.

In the instant case, the complaint alleges, and Father's testimony, if believed, makes out, an oral agreement. In that oral agreement, each of the parties assumed contractual obligations. Father agreed to release his lien on the subject property, which he subsequently did when he executed the writing entitled "Full Release of Lien." According to Father's testimony, Son made two promises: he agreed to put up the property as a bond to secure Father's appearance in the federal criminal case, and he agreed to give Father half of the sales proceeds when the property was sold. According to Father, Son did the former, but not the latter.

We agree with the Chancellor that the oral agreement constitutes the consideration for the release. This action does not seek an interest in land; rather, it seeks satisfaction of the obligations allegedly undertaken by Son in consideration for Father's release of his lien. We do not find the oral agreement to be a "contract for the sale" of an interest in land. *See* T.C.A. § 29-2-101(a)(4). Therefore, we conclude that the statute of frauds is not an impediment to this action.

Even if the oral agreement sought to be enforced in this case is subject to the statute of frauds, nevertheless we find that Son is equitably estopped to assert that defense in this case. *See* ***Baliles v. Cities Service Co***., 578 S.W.2d 621, 624 (Tenn. 1979); ***Knight v. Knight***, 436 S.W.2d 289, 291 (Tenn. 1969). It would not be fair to allow Son to assert the statute of frauds to bar this action after he had already received the benefit of his bargain -- Father's execution of the release. To enforce the statute of frauds in this case would be to "make it an instrument of hardship and oppression, verging on actual fraud." *See* ***Baliles*** at 624. Accordingly, Son cannot assert the statute of frauds as a bar to Father's claim.

B.

The parol evidence rule prevents the introduction of oral testimony to "alter, vary, or qualify the plain meaning of an unambiguous written contract." *See* ***GRW Enterprises, Inc.***, 797 S.W.2d at 610. Son argues that Father's attempt to prove the former's alleged obligation to pay Father half of the sale proceeds is inconsistent with Father's acknowledgment in the release of "payment in full of said [$125,000] indebtedness." We disagree. The release does not state that the payment of the $125,000 is the *only* consideration for the release. *Cf*. ***Perry v. Central Southern Railroad Co***., 45 Tenn. (5 Cold.) 138, 143 (1867) ("[A]lthough the grantor is estopped by the recital in the deed from denying the consideration expressed, yet he is not estopped from proving there were other considerations than the one expressed in the deed.") In the instant case, Father is not suing on the original $125,000 debt. That debt was extinguished

by the release. On the contrary, he is attempting to collect "other considerations." ***Id***. His testimony -- not being inconsistent with the release -- does not run afoul of the parol evidence rule.

C.

We do not find that the evidence preponderates against the trial court's finding that Son promised to pay Father half of the sales proceeds when the property was sold. Both Father and his friend, William Thompson, testified that Son made this commitment. While there was testimony by Son and others that bring into question the truthfulness of Father's evidence, this case came down to a question of whom the Chancellor was going to believe. While conceding that it was a close call, he found the plaintiff's proof on this issue more persuasive than that of Son. As we have said many times, the trier of fact is in the best position to assess the credibility of the witnesses; accordingly, such determinations are entitled to great weight on appeal. ***Massengale v. Massengale***, 915 S.W.2d 818, 819 (Tenn.App. 1995); ***Bowman v. Bowman***, 836 S.W.2d 563, 566 (Tenn.App. 1991). With this in mind, we cannot say that the "preponderance of the evidence is otherwise." *See* Rule 13(d), T.R.A.P.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the trial court for enforcement of the judgment and collection of costs assessed below, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

_____
Herschel P. Franks, J.

_____
William H. Inman, Sr.J.