STATE OF MICHIGAN

COURT OF APPEALS

ANGELL & COSTOPOULOS, P.C.,

Plaintiff–Appellee,

v

SOUTHFIELD DATA PROCESSING, INC,

Defendant,

and

JIM RICHARDSON,

Defendant–Appellant.

UNPUBLISHED
September 20, 1996

No. 171527
LC No. 92-211122 CH

Before: Jansen, P.J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

Defendant Jim Richardson[1] appeals as of right the circuit court judgment entered against him following a bench trial in this landlord-tenant contract dispute. We affirm in part, reverse in part, and remand for further findings of fact.

Defendant raises several issues on appeal. First, defendant argues that because plaintiff could not produce a signed three-year lease and personal guarantee, the statute of frauds could not be satisfied and enforcement of the purported contract is barred. Because the trial court applied the wrong standard in evaluating the evidence, we remand for further proceedings.

Michigan's statute of frauds requires certain contracts to be in writing in order to be enforced. These include contracts for interest in land other than a one-year lease, MCL 566.108; MSA 26.908, and "a promise to answer for the debt, default, or misdoings of another person." MCL 566.132(1)(b); MSA 26.922(1)(b). Where a signed agreement can not be produced and there is a dispute as to

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* Circuit judge, sitting on the Court of Appeals by assignment.

whether the contract or agreement has been signed, a party may establish the existence of the signature through extrinsic and parol evidence. *Zander v Ogihara*, 212 Mich App 438, 443-444; 540 NW2d 702 (1995). However, the evidence used to establish the existence of the signature must be "'clear, strong and unequivocal,' i.e., clear and convincing." *Id.* at 444. In this case, plaintiff could not produce a signed agreement, but offered testimony that defendant signed the agreement and failed to return it. The court found that the existence of an executed lease was "more probable than not." Because the court's findings indicate that it applied the preponderance of the evidence standard, we reverse the judgment and remand for the court to evaluate the evidence under the standard set forth in *Zander*.

Plaintiff suggests, as an alternative basis for affirmance of the judgment, that the doctrine of promissory estoppel precludes defendant from asserting the statute of frauds as a defense. If promissory estoppel can be established, it can be invoked to defeat the defense of the statue of frauds. *Clark v Coats & Suits Unlimited*, 135 Mich App 87, 98; 352 NW2d 349 (1984). However, the trier of fact must decide whether plaintiff has demonstrated the elements of promissory estoppel. *Id.* at 99. (In that case, this Court held that the trial court, ruling on a motion for accelerated judgment, erroneously decided the factual issues relating to the application of promissory estoppel.) See also, *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 88-89; 443 NW2d 451 (1989). Therefore, in the event that, on remand, the trial court determines that the evidence of the executed contract was not adequate to meet the clear and convincing standard, the court, as the trier of fact, shall make additional findings concerning promissory estoppel.

Defendant argues that, even assuming he signed the lease, his subsequent request for attorney review prevented formation of a contract until his attorney reviewed and approved the lease. The trial court implicitly rejected this argument by finding that defendant was obligated to perform under the terms of the lease. The issue of whether attorney review was intended by the parties to be a condition precedent to defendant's performance of the obligations in the lease was a factual issue, apparently resolved by the trial court against defendant. See *Culver v Castro*, 126 Mich App 824, 827; 338 NW2d 232 (1983). In light of testimony presented by plaintiff that at the time defendant made the request to show the lease to his attorney, defendant had already executed one copy of the lease, we are not persuaded that the trial court's determination was in error. We are likewise not persuaded by defendant's argument that this was "an agreement in escrow", or that defendant's acceptance was a conditional acceptance because of his request to have his attorney review the lease.

Defendant also argues that the trial court erred in holding that it had jurisdiction over him because no summons was issued to him and, therefore, he was never given actual notice that he was being sued individually. A party who enters a general appearance submits to the court's jurisdiction and waives service of process objections. *Penny v ABA Pharmaceutical Co (On Remand)*, 203 Mich App 178, 181; 511 NW2d 896 (1993). "Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear." *Id.* at 182. Defendant Richardson admits that he was served with the first amended complaint. The caption of the first amended complaint identifies Richardson as a defendant, and contains Count VI "Personal Guarantee" in which plaintiff alleged that defendant personally guaranteed payment and performance of the obligations of the lease. Moreover, at trial,

defendant took steps to defend this cause of action by asserting that no personal guarantee was executed. In light of these facts, we find that defendant entered a general appearance, thereby submitting to the court's jurisdiction and waiving any service of process objections.

Lastly, defendant argues that the trial court abused its discretion in relying on the unsigned lease agreement because the lease was not received into evidence. We find this argument to be without merit. Plaintiff marked the unsigned lease as an exhibit and moved to have it admitted into evidence. Although defense counsel objected to the admission of the evidence, the trial court overruled the objection. The propriety of the court's ruling is not challenged on appeal. Thus, although the trial court did not expressly receive the unsigned lease into evidence, we find that by overruling the only objection made to the lease's admission, the court implicitly received the exhibit into evidence. As a result, the trial court did not err when it relied on the exhibit in rendering its decision.

Affirmed in part, reversed in part and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza

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[1] Defendant Southfield Data has been out of business since December, 1991, and has not appealed the judgment.