GORDON EUGENE BELL and NORMA BELL,
Plaintiffs/Counter-Defendants-Appellees,
v.
KEITH BELL,
Defendant/Counter-Plaintiff-Appellant,
MELANIE BELL LORANT, GP GBNB MANAGEMENT HOLDINGS, LLC, and GBNB MANAGEMENT HOLDINGS, LP,
Third-Party Defendants-Appellees.

No. 32,852

COURT OF APPEALS OF NEW MEXICO

December 8, 2015

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, William G. Shoobridge, District Judge

COUNSEL

Hinkle Shanor LLP, Richard E. Olson, Lucas M. Williams, Roswell, NM, for Appellee Gordon Eugene Bell

Phillip T. Brewer, Roswell, NM, for Appellees Melanie Bell Lorant, GP GBNB Management Holdings, LLC, and GBNB Management Holdings, LP, Charles N. Estes Jr., Albuquerque, NM, for Appellant

JUDGES

RODERICK T. KENNEDY, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, CYNTHIA A. FRY, Judge

AUTHOR: RODERICK T. KENNEDY

MEMORANDUM OPINION

KENNEDY, Judge.

{1} Keith Bell appeals a judgment of the district court that determined he has no right to receive settlement proceeds from another lawsuit. Concluding that the judgment is supported by substantial evidence and that Appellant's arguments concerning the statute of frauds and parol evidence are without merit, we affirm.

{2} Because this is a memorandum opinion and the parties are familiar with the facts of the case, we present only a limited outline of the facts relevant to our decision.

I. BACKGROUND

{3} Keith[1] was listed as a plaintiff in a 2009 settlement agreement between family members who were embroiled in a lawsuit. He was listed as a plaintiff because he was a beneficiary of a family trust—the "Bell Brothers Trust" (BBT). The settlement agreement in the underlying suit, known as the "Bell Settlement Agreement" (BSA), allows for payments to be "made to persons or entities as specifically directed by and at the sole discretion of the Bell Plaintiffs." The BSA defined the "Bell Plaintiffs" to include: Keith's parents, Eugene (Gene) and Norma Bell; Keith's sister, Melanie Bell Lorant; and Keith.

{4} Keith claimed a right to a portion of the BSA proceeds based on his status as a beneficiary of the BBT. Gene and Norma brought suit against Keith in 2012 seeking declaratory judgment stating that Keith is not entitled to any of the BSA proceeds. In response, Keith filed an answer, a counterclaim against his parents, and a third-party complaint against his sister.[2]

{5} The district court held a bench trial in the case, after which it issued a judgment containing findings of fact and conclusions of law. In its findings and conclusions, the district court found that the BSA did not define how its proceeds were to be distributed to the Plaintiffs, and that a separate agreement had been entered into by the Bell Plaintiffs to give the BSA proceeds to Gene. On appeal, Keith contends that the district court's findings as to the BSA proceeds are not supported by substantial evidence and that the finding regarding Bell Gas, Inc. was clearly erroneous. Additionally, Keith contends that the agreement between the Plaintiffs giving Gene all BSA proceeds violated both the statute of frauds and the parol evidence rule.

II. DISCUSSION

A. Substantial Evidence

{6} Appellate courts are "bound by the trial court's findings of fact unless they are demonstrated to be clearly erroneous or not supported by substantial evidence." *Roybal*

v. Morris, 1983-NMCA-101, ¶ 30, 100 N.M. 305, 669 P.2d 1100. The substantial evidence standard has been summarized as follows:

> Substantial evidence is relevant evidence that a reasonable mind could accept as adequate to support a conclusion. In reviewing a substantial evidence argument, the question is not whether substantial evidence exists to support the opposite result, but rather whether such evidence supports the result reached. We will not reweigh the evidence nor substitute our judgment for that of the fact finder. We consider the evidence in the light most favorable to the prevailing party and disregard any inferences and evidence to the contrary.

Khalsa v. Puri, 2015-NMCA-027, ¶ 15, 344 P.3d 1036 (alterations, internal quotation marks, and citations omitted). We will not disturb a trial court's findings, weigh evidence, resolve conflicts or substitute our judgment as to the credibility of witnesses where evidence substantially supports its findings of fact. *Romero v. Garcia*, 1976-NMSC-002, ¶ 9, 89 N.M. 1, 546 P.2d 66. "It is for the trial court to weigh the testimony, determine the credibility of witnesses, reconcile inconsistent statements and determine where the truth lies." *Lopez v. Adams*, 1993-NMCA-150, ¶ 2, 116 N.M. 757, 867 P.2d 427.

1. District Court's Finding that there was an Agreement that Gene Would Receive All Proceeds

{7} Keith acknowledges that the BSA made no allocation of the settlement proceeds among the Bell Plaintiffs—distribution of all proceeds received was left to their discretion. Similarly, there was no written agreement among them detailing how the proceeds would be distributed. Despite claiming entitlement to various portions of the proceeds throughout the case, Keith ultimately contends that he, Melanie, and Gene should each get one-third of the BSA proceeds. Gene and Melanie maintain that Gene was to receive all of the proceeds.

{8} There was substantial evidence presented during trial to support the conclusion that Gene, Norma, Melanie, and Keith agreed that all BSA proceeds should go to Gene. Gene testified that the family members all agreed the proceeds should go to him, and denied having been privy to an agreement that divided the proceeds equally between himself, Melanie, and Keith. Melanie testified that she, Keith, Norma, and Gene all agreed that 100% of the BSA proceeds were to go to Gene. Gregory Jones, the family's lawyer throughout the BSA negotiations, gave a deposition that was used at trial. He stated that it was never disputed that Gene was to have 100% ownership over the proceeds because they represented Gene's contribution to the businesses he had helped create. Jones denied having known of any agreement providing for a three-way division of the proceeds. Evidence also revealed Keith received emails during the settlement and immediately after the settlement, emphasizing that neither he nor his sister were to receive any portion of the BSA proceeds. Keith admitted that he never responded to the emails and never contacted anyone to dispute what was stated in those emails.

{9} Keith testified during trial in support of his contentions regarding the division of proceeds. He testified that he, Melanie, and Mr. Jones had agreed to a three-way division of the proceeds during a car ride; according to Keith, Gene, Melanie, and Mr. Jones were in the car at the time.

{10} The evidence, considered in the light most favorable to the prevailing party, is substantial enough to support the district court's findings of fact on the agreement regarding BSA proceeds. Those findings provide that Gene, Norma, Melanie, and Keith agreed that all BSA proceeds would go to Gene, and that Melanie and Keith, whose status depended solely on their interest in the BBT, would receive none of those proceeds. Although Keith presented testimony that conflicted with these findings, it is not for this Court to resolve conflicts or substitute our judgment for the district court's regarding the credibility of witnesses. *Romero*, 1976-NMSC-002, ¶ 9.

B. Statute of Frauds

{11} Keith argues that the agreement to give all BSA proceeds to Gene is barred by the statute of frauds. The statute of frauds "is intended to protect against fraud; it is not intended as an escape route for persons seeking to avoid obligations undertaken by or imposed upon them." *Pattison Trust v. Bostian*, 1976-NMCA-129, ¶ 4, 90 N.M. 54, 559 P.2d 842. To satisfy the statute of frauds, a contract must be in writing. *Pitek v. McGuire*, 1947-NMSC-053, ¶ 28, 51 N.M. 364, 184 P.2d 647. Where the contract is not in writing, and it cannot be performed within one year, it is void. *Skarda v. Skarda*, 1975-NMSC-028, ¶ 21, 87 N.M. 497, 536 P.2d 257. Keith asserts that because, according to the terms of the BSA, the payments to Gene cannot all be made within one year, any agreement to give Gene all proceeds violates the statute of frauds. Keith's requested remedy is that all further distributions comply with the written terms of the BSA. Keith relies on the BSA's proscribed installment system in arguing that the agreement to give Gene all proceeds cannot be performed within one year and therefore violates the statute of frauds.

{12} The oral agreement to give Gene all BSA proceeds exists separately from the BSA itself. The BSA does not violate the statute of frauds; although it requires that proceeds be paid in installments spanning a time period greater than one year, it does so in a written instrument. The BSA only requires the Bell Plaintiffs to designate an individual or entity to whom the BSA proceeds are to be paid. The oral agreement does just that. Although not in writing, the oral agreement was completed within one year of its creation; a limited partnership and a limited liability company (GBNB) were created for the purpose of receiving BSA proceeds. Thus, the oral agreement designated an entity, through which Gene was to receive all BSA proceeds, within one year of its creation. Because the oral agreement—to designate who would receive the BSA proceeds—was both separate from the BSA and accomplished within one year, it does not violate the statute of frauds. As such, Keith's challenge fails.

C. Keith's Parol Evidence Argument

1. Preservation of Parol Evidence Argument

{13} During trial, evidence that there was an agreement to give Gene all BSA proceeds was admitted without objection. At no point in the proceedings did Keith object to the admission of testimony pertaining to the making of the agreement. In fact, Keith made no mention of the parol evidence rule until he submitted his proposed findings and conclusions.

{14} Keith now argues on appeal that the district court's findings of an agreement between the Plaintiffs are precluded by the parol evidence rule because the agreement modifies the BSA. Since we "review[] the case litigated below, not the case that is fleshed out for the first time on appeal . . . . , we cannot review [Keith's] allegations which were not before the district court." *Campos Enters., Inc. v. Edwin K. Williams & Co.*, 1998-NMCA-131, ¶ 12, 125 N.M. 691, 964 P.2d 855 (internal quotation marks and citations omitted). The parol evidence rule governs the admissibility of evidence. *See* 32A C.J.S. *Evidence* § 1401 (2015). As such, in order to contest the admissibility and propriety of parol evidence on appeal, Keith must have objected to its admission during trial. *See Pino v. Beckwith*, 1852-NMSC-003, ¶ 6, 1 N.M. 19, 1 Gild 19 (upholding trial court's refusal to exclude parol evidence from the jury where parol evidence was admitted without objection and defendant made subsequent motion to exclude it); *see also* Gary D. Spivey, J.D., Annotation, *Modern Status of Rules Governing Legal Effect of Failure to Object to Admission of Extrinsic Evidence Violative of Parol Evidence Rule*, 81 A.L.R. 3d 249 § 7 (1977) ("[W]here no objection or proper motion is raised in the trial court with respect to the admissibility of evidence violative of the parol evidence rule, error in the reception of such evidence may not be asserted in an appellate court."); *Sun Vineyards, Inc. v. Luna Cty. Wine Dev. Corp.*, 1988-NMSC-075, ¶ 10, 107 N.M. 524, 760 P.2d 1290 (holding that appellant waived claim of error by failing to object to introduction of parol evidence); *Cf. Bishop v. Mace*, 1919-NMSC-046, ¶ 6, 25 N.M. 411, 184 P. 215 ("Objections not made in the court below to the admissibility of evidence will not be considered on appeal.). Because Keith did not object to the evidence's admission, he cannot now contest it on appeal.

2. Merits of Parol Evidence Argument

{15} Even if Keith's parol evidence challenge was a timely preservation of the issue, Keith's argument fails on the merits because the Plaintiffs' agreement to give Gene all BSA proceeds is an arrangement entirely separate from the BSA, the creation of which was contemplated, but not governed, by the BSA. The parol evidence rule provides that, where ambiguity exists in an agreement, the fact finder may consider extrinsic evidence of the circumstances surrounding the agreement to aid in its interpretation of the agreement; however, "no evidence should be received when its purpose or effect is to contradict or vary the agreement's terms." *Mark V, Inc. v. Mellekas*, 1993-NMSC-001, ¶ 13, 114 N.M. 778, 845 P.2d 1232. The parol evidence rule applies only to oral agreements made prior to or contemporaneous with the written agreement. *Yucca Mining & Petroleum Co. v. Howard C. Phillips Oil Co.*, 1961-NMSC-155, ¶ 28, 69 N.M. 281, 365 P.2d 925; *see also Ruggles v. Ruggles*, 1993-NMSC-043, ¶ 57, 116 N.M. 52,

860 P.2d 182 (stating that, under the parol evidence rule, extrinsic evidence is inadmissible to contradict the terms of an agreement, but is admissible to explain the terms of the agreement). Thus, the operative question becomes "whether the evidence is offered to contradict the writing or to aid in its interpretation." *C.R. Anthony Co. v. Loretto Mall Partners*, 1991-NMSC-070, ¶ 16, 112 N.M. 504, 817 P.2d 238.

{16} The BSA contained no agreement as to disposition of its proceeds between Plaintiffs. The Plaintiffs' agreement is therefore separate from the BSA and provides terms on which the BSA was silent that apply to the Plaintiffs alone. It does not contradict the BSA's terms. In fact, in his testimony, Keith acknowledged that the BSA does not allocate the division of proceeds.

{17} The language of the BSA pertaining to the BBT, which Keith relies on for his claim of entitlement, is similarly in accord with the district court's finding regarding the agreement. The BSA recognized Keith and Melanie as having an interest in the BBT only to the extent that they might set up decanting trusts. No "assets or funds" of the BBT were to be paid to Keith and Melanie because they were allocated by the BSA to Defendants to meet their obligations thereunder. No decanting trusts were ever established or funded by or for Keith and Melanie.[3] According to the BSA, Keith and Melanie were to have "no further interest or claim" against the BBT aside from setting up the decanting trusts.

{18} The BSA places an obligation on Gene, Melanie, Keith, and Norma to designate to whom the BSA proceeds would be paid. The agreement between them designates Gene as the recipient of all proceeds. No proceeds were to go to the BBT unless pass-through decanting trusts were created; they were not. To allow Keith to exercise his right to receive proceeds solely through his interest in the BBT would be contrary to the terms of the BSA; Keith had "no further interest or claim against the [BBT]" aside from creating decanting trusts, the funding for which was not established.

III. CONCLUSION

{19} Having found substantial evidence to support the district court's judgment, we affirm.

{20} IT IS SO ORDERED.

RODERICK T. KENNEDY, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

CYNTHIA A. FRY, Judge

1The course of litigation between these parties is lengthy and complex. In order to avoid confusing the reader with over-technical legal characterizations of the parties' statuses and in light of their shared last names, we will refer to the parties using their first names.

2He alleged breach of fiduciary duty, conversion, fraud, fraudulent inducement, negligent misrepresentation, intentional interference, and promissory estoppel.

3Decanting trusts may be considered to transfer assets from an irrevocable trust such as the BBT to subsequent trusts that are formed for any number of reasons, including to avoid some tax consequences from "generation-skipping trusts," of which the BBT was one. **[BIC 7]** *See* Melissa J. Willms, "*Decanting Trusts: Irrevocable, Not Unchangeable*," 6 Est. Plan. & Community Prop. L.J. 35, 40 (Fall 2013).