This document was signed electronically on August 26, 2016, which may be different from its entry on the record.

IT IS SO ORDERED.

Dated: August 26, 2016

ALAN M. KOSCHIK
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re	
	Case No. 14-51667
RICHARD WILLIAM PROVENCE, III and AMANDA RUTH PROVENCE	Chapter 7
Debtors.	Adversary Proceeding No. 15-5119
	Judge Alan M. Koschik
MARC P. GERTZ,	
Plaintiff,	**MEMORANDUM DECISION ON THE DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**
v.	
FRISBY PRINTING COMPANY dba MINUTEMAN PRESS,	
Defendant.	

Now before the Court is the motion for judgment on the pleadings filed by Defendant Frisby Printing Company dba Minuteman Press (the "Defendant") in this adversary proceeding.

Plaintiff Marc P. Gertz (the "Plaintiff"), the chapter 7 trustee in the underlying bankruptcy case of Richard William Provence, III and Amanda Ruth Provence (the "Debtors") in which this adversary proceeding arises, filed this proceeding on October 21, 2015. The Defendant filed its answer on November 10, 2015, and then filed the instant motion for judgment on the pleadings on December 1, 2015 (the "Motion"). Plaintiff filed a response brief in opposition on December 16, 2015 (the "Response"), and Defendant filed a reply in support on December 30, 2015 (the "Reply"). The Court did not hold oral argument on the motion and took the matter under advisement.

For the reasons set forth herein, the Defendant's Motion will be granted, but the Plaintiff will be granted leave of thirty (30) days to amend its Complaint before a final judgment will issue. Viewed in the light most favorable to the nonmoving party (the "Plaintiff"), no action for money due on the asset purchase agreement in question can be maintained on the facts pled, since the agreement was not signed by the Defendant and none of the judicially-recognized exceptions to the Ohio statute of frauds apply. However, the arguments made in the Plaintiff's Response provide sufficient grounds for granting leave to amend the Complaint before the Court enters judgment in favor of the Defendant based on this Memorandum Decision.

JURISDICTION AND VENUE

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered by the United States District Court for the Northern District of Ohio on April 4, 2012. Venue is proper pursuant to 28 U.S.C. § 1409(a).

As an ordinary contract claim against an entity that has not filed a proof of claim in the case, this is a noncore proceeding under 28 U.S.C. § 157(b)(2) and (3). Defendant has properly denied that this is a core proceeding (Answer ¶ 1), but has not included the required statement

under Rule 7012 of the Federal Rules of Bankruptcy Procedure, which requires that if "the response is that the proceeding is non-core, it shall include a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge." Fed. R. Bankr. P. 7012(b).

In the absence of compliance with that rule, the Court must consider whether Defendant has given implied consent to the entry of final orders by this Court. *See Wellness International Network, Ltd. v. Sharif*, ____ U.S. ____, ____, 135 S.Ct. 1932, 1948 (2015) (knowing and voluntary implied consent is sufficient to authorize entry of final orders by the bankruptcy court). The Court answers in the affirmative, based on the most obvious fact: while Defendant may have omitted its express statement under Bankruptcy Rule 7012(b) regarding whether he consented to this Court's entry of final orders, it has *asked* this Court to enter one by moving for judgment on the pleadings.

STANDARD OF REVIEW

After the pleadings are closed, but early enough not to delay trial, a party may move for judgment on the pleadings. Fed R. Civ. P. 12(c) (incorporated into bankruptcy practice by Fed. R. Bankr. P. 7012(b)). Courts grant motions for judgment on the pleadings when "all well-pleaded material allegations of the pleadings of the opposing party [are] taken as true, and . . . the moving party is nevertheless clearly entitled to judgment." *Monroe Retail, Inc. v. RBS Citizens, N.A.*, 589 F.3d 274 (6th Cir. 2009) (quoting *JPMorgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007). Rule 12(c) "is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 313 (5th Cir. 2002).

Motions for judgment on the pleadings are analyzed under the same standard of review employed for a motion to dismiss under Rule 12(b)(6). *Tucker v. Middleburg-Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008).

FACTUAL AND PROCEDURAL HISTORY

Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code on June 26, 2014. On item 18 of their statement of financial affairs, the Debtors disclosed ownership of a business, RProvision Media, LLC ("RPM"), with an end date of October 2013. On item 10 of their statement of financial affairs, requesting information on transfers outside the ordinary course of business, the Debtors disclosed a transfer in October 2013 to Paris Frisby listed as a "business asset sale" with a $20,000 sale price consisting of a $3,000 initial payment and $1,000 monthly thereafter. On item 18 of the Debtors' Schedule B, they scheduled an amount of $9,000 as "balance of business asset sale" as an asset, further noting that they had received $3,000 in October 2013 and $1,000 monthly thereafter.

The Plaintiff-trustee filed the instant adversary proceeding on October 21, 2015. Trustee alleges that in the fall of 2013, prior to the bankruptcy filing, Debtor Richard W. Provence, III, as president of RPM, executed an asset purchase agreement to sell the assets of RPM to Defendant for the sum of $20,000. (Compl. ¶ 6.) Plaintiff does not allege that Defendant also executed the asset purchase agreement, and in subsequent briefing concedes that Defendant in fact refused to sign it. The Defendant attached an unexecuted copy of the asset purchase agreement to its Answer as Exhibit A. Plaintiff seeks to collect from Frisby Printing the $9,000 listed on Schedule B as still due and owing from the sale of RPM assets in October 2013.

The Defendant filed its answer on November 10, 2015, denying every allegation in the Complaint other than the fact that Frisby Printing Company dba Minuteman Press is a

corporation for profit organized under the laws of the State of Ohio. The Defendant then filed its Motion for judgment on the pleadings on December 1, 2015.

LEGAL ANALYSIS

The Defendant's legal argument is straightforward: the Plaintiff has not alleged that the Defendant signed the asset purchase agreement nor produced any exhibit showing such execution. The alleged terms of the asset purchase agreement are a $3,000 initial payment followed by seventeen monthly payments of $1,000. Since these terms on their face cannot be completed within one year, the Defendant argues that as a matter of law, the terms of the asset purchase agreement are unenforceable under Ohio's statute of frauds, R.C. 1335.05. That statute provides, in relevant part:

> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

Id.

The Plaintiff, in his Response, concedes that the Defendant never signed the asset purchase agreement, arguing instead that the agreement to sell the assets of RPM "was intended to be memorialized through an asset purchase agreement" in the form attached to the Complaint,[1] and that the Defendant "refused to sign the asset purchase agreement." (Response at

[1] Notwithstanding this statement in the Plaintiff's Response, the unsigned asset purchase agreement is not attached to the Complaint. A purported unsigned asset purchase agreement is attached to the Defendant's Answer as Exhibit 1. In his Response, the Plaintiff appears to accept that that document is the unsigned agreement he refers to even though he confuses the fact that it is attached to the Answer, not the Complaint.

2.) The Defendant nevertheless makes two counterarguments as to why the statute of frauds should not justify judgment as a matter of law for the Defendant. First, the Plaintiff argues that the doctrine of part performance removes the agreement from the statute of frauds; second, the Plaintiff argues that the doctrine of quasi-contract or promissory estoppel removes the agreement from the statute of frauds.

A. Part Performance as an Exception to the Statute of Frauds.

The Plaintiff's first argument that the asset purchase agreement can still be enforced notwithstanding the statute of frauds rests on the part performance doctrine.

However, the Ohio Supreme Court held in *Hodges v. Ettinger*, 127 Ohio St. 460 (1934) that the part performance doctrine can only be invoked in certain circumstances, none of which apply here:

> The doctrine of part performance can be invoked, to take a case out of the statute of frauds in Ohio, only in cases involving the sale or leasing of real estate, wherein there has been a delivery of possession of the real estate in question, and in settlements made upon consideration of marriage, followed by actual marriage. Such doctrine of part performance has no place in the law governing contracts for personal services.

Id. at 460. This holding has apparently survived in Ohio to this day. In *Spectrum Benefit Options, Inc. v. Medical Mutual of Ohio*, 174 Ohio App. 3d 29, 880 N.E.2d 926 (2007), the Ohio Fourth District appellate court cited *Hodges* in ruling that the doctrine of part performance does not apply to contracts to sell health insurance, finding such contracts to be personal service contracts. *Id.* at 45. In *Everstaff, LLC v. Sansai Environmental Technologies, LLC*, 2011 WL 4390083, *5 (Ohio App. Sept. 22, 2011), the Ohio Eighth District appellate court cited *Hodges* in stating that "the doctrine of part performance is not a general exception to the statute of frauds …" and holding that, while an oral promise to answer for the debt of another might be enforceable for other reasons, it could not be so on the basis of part performance.

The Defendant fairly observes that the three cases cited by Plaintiff in its argument on part performance all involve the sale or lease of real estate: *Hughes v. Oberholtzer*, 162 Ohio St. 330, 123 N.E.2d 393 (1954); *Tier v. Singrey*, 154 Ohio St. 521, 97 N.E.2d 20 (1951); and *Collett v. DeHaven*, 24 Ohio App. 2d 4, 263 N.E.2d 252 (1970). The Court's further review of Ohio caselaw has similarly failed to find any extension of the doctrine outside of the context of sale, lease, or other transfer of real estate. *See, e.g., Delfino v. Paul Davies Chevrolet, Inc.*, 2 Ohio St. 2d 282, 209 N.E.2d 194 (1965); *Myers v. Croswell*, 45 Ohio St. 543, 15 N.E. 866 (1888); *Beaverpark Assocs. v. Larry Stein Realty Co.*, 1995 WL 516469 (Ohio Ct. App. Aug. 30, 1995); *Manifold v. Schuster*, 67 Ohio App. 3d 251, 586 N.E.2d 1142 (1990); *Heiss v. Gragg*, 1989 WL 128875 (Ohio Ct. App. Oct. 31, 1989).

Therefore, while there is a certain logic to extending *Hodges* to circumstances involving the sales of personal property, it does not appear that Ohio courts or courts applying Ohio law have done so. However, courts have also had little opportunity to examine the issue: contracts for sales of personal property do not ordinarily fall within R.C. 1335.05 in the way contracts for sale of real estate do,[2] and so there is little occasion for courts to consider under what circumstances they ought to be removed from the ambit of the statute—they are not within the

[2] There are separate statutes of frauds within the Uniform Commercial Code (the "UCC") governing sales of goods and leases of goods, and in the case of sales of securities the UCC provides an exception from any otherwise applicable statute of frauds. *See* R.C. 1302.04, 1308.07, and 1310.08. If the business assets here had consisted entirely of goods within the meaning of the UCC, the applicable Article 2 statute of frauds would not bar enforcement of the alleged contract because the assets have been "received and accepted" within the meaning of R.C. 1302.64. Conversely, the UCC specifically exempts sales of securities from the statute of frauds, even if such contracts cannot be performed within one year of their making. R.C. 1308.07. In other words, had Frisby purchased just the inventory and equipment of RPM, the applicable UCC Article 2 statute of frauds would not bar enforcement of the contract; had Frisby purchased all the shares of RPM, UCC Article 8's exception to all statute of frauds would likewise ensure that no statute of frauds could bar enforcement of the contract; and had Frisby agreed that the purchase price in the agreement at issue here must be paid over the span of twelve months or less instead of seventeen, the general statute of frauds relied on by the Defendant in its Motion would likewise not be a barrier. However, it is the general statute of frauds that applies here and the circumstances and nature of the contract underlying the claim do not support a valid exception to that statute. One statute of frauds is enough to bar the Plaintiff's claim in this adversary proceeding.

ambit of the statute of frauds in the first place. This case raises a statute of frauds issue only because of the seventeen-month payment term contained within the draft asset purchase agreement itself, which triggers scrutiny under the bar in R.C. 1335.05 on unwritten contracts "not to be performed within one year from the making thereof," rather than the statute's separate bar on contracts for the "sale of lands, tenements, or hereditaments, or interest in or concerning them," or the separate statutes of fraud applicable to the sale of goods or lease of goods under the Uniform Commercial Code. *Id.*

It is true that the facts as alleged here—viewed in the light most favorable to the Plaintiff—contain many of the same indicia of a binding contract between the parties that courts in the *Hodges* line of cases have observed. Expanding on *Hodges* and its requirement that the party seeking to defeat the statute of frauds via part performance show that the real estate in question had actually been delivered, the Ohio Supreme Court later held:

> The plaintiff must be able to show such acts and conduct of the defendant as the court would hold to amount to a representation that he proposed to stand by his agreement and not avail himself of the statute to escape its performance; and also that the plaintiff, in reliance on this representation, has proceeded, either in performance or pursuance of his contract, so far to alter his position as to incur an unjust and unconscientious injury and loss, in case the defendant is permitted after all to rely upon the statutory defense.

Tier, 154 Ohio St. at 529. The plaintiff must allege "acts or conduct of the grantor and the grantee clearly consistent with and referable to the agreement as pleaded and which can not reasonably be accounted for in any other manner than as having been done in pursuance of such agreement." *Hughes*, 162 Ohio St. at 330, paragraph three of the syllabus.

In this case, it certainly appears that Debtor transferred the business assets of RPM to Frisby prepetition and that Frisby paid for the same in the amounts contemplated by the unsigned asset purchase agreement until the date of Debtor's bankruptcy filing. Neither the transfer nor the payment are reasonably explicable without *some* binding purchase agreement. Indeed,

without some agreement to that effect, it would remain an open question by what right Frisby is currently in possession of RPM's former assets.

Notwithstanding these concerns, however, this Court has been unable to find any circumstance in which courts applying Ohio law have extended the part performance doctrine under the statute of frauds to contracts that cannot be completed within the span of one year. Therefore, this ground is unavailing to the Plaintiff as a means of enforcing the alleged asset purchase agreement notwithstanding the statute of frauds.

B. Quasi-Contract or Promissory Estoppel as an Exception to the Statute of Frauds.

Plaintiff also contends that quasi-contract, or promissory estoppel, may operate to "lift [the] promise above the statute of frauds." (Pl.'s Objection at 6.) Plaintiff cites *Gathagan v. Firestone Tire & Rubber Co.*, 23 Ohio App. 3d 16, 490 N.E.2d 923 (1985). The syllabus of that case is as follows:

> 1. Since the general purpose of the Statute of Frauds (R.C. 1335.05) is to prevent and not to perpetrate fraud, courts will not permit the statute to be used as a shield to protect fraud.
>
> 2. The defense of the Statute of Frauds (R.C. 1335.05) to an action to seek enforcement of an oral contract of employment for two years may be overcome by the doctrine of promissory estoppel. (*Hodges v. Ettinger* [1934], 127 Ohio St. 460, 189 N.E. 113, distinguished.)
>
> 3. When a party seeks to rebut or overcome the defense of the Statute of Frauds (R.C. 1335.05) by using the doctrine of promissory estoppel, the issue of whether the promisee's reliance is sufficient to estop the promisor from raising the statute as a bar is a question of fact to be decided by the trier of fact.

Id., paragraphs 1-3 of the syllabus. Based on this understanding of the law, the Ohio Ninth District held in *Gathagan* that it was legally possible for the jury to find that the defendant employer had given an Akron employee an unwritten 24-month promise of employment if he would transfer to a Memphis plant, that the promise induced the employee to do so (and induced him to not seek a separate possible transfer to a different plant in Des Moines), and that he

suffered damage as a result when Firestone closed the Memphis plant and terminated his employment two months after he moved to Memphis. The court remanded the case because the jury was not actually instructed on the statute of frauds, and "whether the promisee's reliance is sufficient to estop the promisor from raising the statute as a bar is a question of fact to be decided by the trier of fact." *Id.* However, on the central legal issue, the *Gathagan* court held, "[w]e have carefully examined Ohio case law and find nothing to indicate that plaintiff is foreclosed from raising an estoppel theory to defeat the [statute of frauds] defense." *Id.* at 18.

That part of the *Gathagan* holding is at least rendered suspect, if not completely voided, however, by the Ohio Supreme Court's much more recent holding in *Olympic Holding Co., LLC v. ACE Ltd.*, 122 Ohio St. 3d 89 (2009). The Ohio Supreme Court held therein:

> We decline to recognize an exception to the statute of frauds even when the promise to execute an agreement is fraudulent or misleading. If a party establishes that a promise to execute an agreement is misleading or fraudulent, promissory estoppel is an equitable remedy available to recover reliance damages.

Id. at *96. Therefore, under Ohio law since 2009, "a party may not use promissory estoppel to bar the opposing party from asserting the affirmative defense of the statute of frauds, which requires that an enforceable contract must be in writing and signed by the party to be charged." *Id.*, paragraph two of the syllabus. The only fair reading of the decision is that no other quasi-contractual doctrines will nullify a statute of frauds defense either; the court's language unmistakably directs parties aggrieved by the breach of an oral promise on which they relied to their detriment to file a standalone cause of action for promissory estoppel (or potentially for other quasi-contractual recovery, such as unjust enrichment), rather than for a breach of a contract that the statute of frauds renders unenforceable.

Therefore, *Olympic Holding* requires the conclusion that promissory estoppel, like part performance, is unavailable as an argument to ignore the statute of frauds and enforce the alleged

contract. Further, neither promissory estoppel nor unjust enrichment have actually been pled as standalone causes of action in the Complaint, even though it is clear enough from the subsequent briefing that the Plaintiff is making arguments potentially aimed at the elements of such a claim.

Given Plaintiff's factual allegations and the necessity of viewing those allegations in the light most favorable to Plaintiff at this stage, leave to amend is warranted in this instance to allow Plaintiff to bring additional causes of action if he believes such additional claims would be consistent with the facts pled or that can reasonably be pled.

CONCLUSION

As a matter of law, Plaintiff's Complaint cannot survive as a complaint for money due under the asset purchase agreement, and the sole count alleged in the Complaint is for money due pursuant to that agreement. The purported agreement was not signed by the Defendant and, because the alleged contract "was not to be performed within one year of the making thereof," it may not be enforced by virtue of Ohio's Statute of Frauds, R.C. § 1335.05. For this reason, the Defendant's Motion for Judgment on the Pleadings will be granted.

However, Plaintiff's subsequent briefing and the factual allegations in the Complaint, viewed (as the Court must at this stage) in the light most favorable to Plaintiff as the nonmoving party, warrant leave to amend.

Therefore, contemporaneously with this Memorandum Decision, the Court will enter a preliminary order granting the Defendant's Motion, but also granting the Plaintiff leave to amend his Complaint within thirty (30) days of entry of the Order. If after 30 days the Plaintiff has failed to file an amended complaint, the Court will enter a final order consistent with this Memorandum Decision granting judgment in favor of the Defendant.

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