

**United States Bankruptcy Court
Western District of Wisconsin**

Cite as: [Unpublished]

**Pirates Hyjacked Robbed and Stole Everything, Inc., Plaintiff v.
State Fair Exposition Center, Inc., Defendant**

(In re Pirates Hyjacked Robbed and Stole Everything, Inc., Debtor)

Bankruptcy Case No. 04-12017-11

Adv. Case No. 04-00117-11

United States Bankruptcy Court
W.D. Wisconsin, Madison Division

August 19, 2004

Roger Merry, Merry Law Offices, S.C., Monroe, WI for the plaintiff.

John C. Thomure, Michael Best & Friedrich LLP, Milwaukee, WI for the defendant.

Robert D. Martin, United States Bankruptcy Judge

MEMORANDUM DECISION

The defendant has answered and separately moved to dismiss this adversary proceeding to enforce a contract because plaintiff failed to allege a writing which satisfies the statute of frauds. Wisconsin law applies.

The plaintiff ("Pirates") contracted with the defendant ("SFPEC") to promote and hold trade shows. SFPEC contracts with consumer trade show producers for the use of the Wisconsin Exposition Center. Pirates used that venue in 2003 and 2004 and payments were made in full.

Pirates' complaint alleges it entered into a licensing agreement with SFPEC for use of the venue for the years 2003 through 2012 and that SFPEC has refused to honor the contract. Pirates alleges that it paid consideration to SFPEC for the years 2003 through 2006. Pirates requests that SFPEC be enjoined from honoring any other leases it may have made and honor Pirates' alleged contract. No exhibits were attached to the complaint.

"The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide the merits. Thus, a motion to dismiss for a failure to state a claim can be granted only if it appears beyond doubt that the plaintiff could prove no set of facts entitling him to relief." Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583, 586 (7th Cir. 1989), citing Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Ellsworth v. City of Racine, 774 F.2d 182, 184 (7th Cir.1985), *cert. denied*, 475 U.S. 1047 (1986). The issue is not whether Pirates

would ultimately prevail, but whether Pirates has pled a cause of action sufficient to entitle it to offer evidence to support its claim. "In considering the motion, the Court must accept all pleaded facts as true and draw all reasonable inferences in a light most favorable to the non-moving party." Schwinn Cycling & Fitness Inc. v. Benonis, 217 B.R. 790, 795 (N.D. Ill.1997), citing Dawson v. General Motors Corp., 977 F.2d 369, 372 (7th Cir.1992).

According to Pirates, in July 2002, it entered into a licensing agreement with SFPEC for the use of the Wisconsin Exposition center for the years 2003 through 2012. Pirates also alleges that consideration was paid to SFPEC for the years 2003 through 2006. The obligations of SFPEC cannot be performed within one (1) year.

Wisconsin Statute 241.02(1)(a) provides:

(1) . . . [E]very agreement shall be null and void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

(a) Every agreement that by its terms is not to be performed within one (1) years from the making thereof.

An exception to this statute of frauds may exist for agreements which are partially performed within one (1) year. The Pirates' deposits for the 2003 through 2006 shows may constitute part performance and may remove the contract from the statute of frauds. However, generally, the mere part performance of an oral contract not to be performed within a year does not take it out of the operation of the statute of frauds. To take an agreement out of the statute of frauds on the grounds of part performance, the acts relied on must unequivocally refer to and result from the agreement. They must be such as would not have been performed but for that very agreement and with a direct view to its performance and must be such as to leave no uncertainty in the case. Curtis Land & Loan Co. v. Interior Land Co., 118 N.W. 853, 855 (Wis. 1908). "The doctrine [of part performance, as exception to statute of frauds,] requires that there be such conduct on the part of the parties in performance of the oral contract that to hold it invalid as violating statute of frauds would itself work a fraud or hardship . . ." Toulon v. Nagle, 226 N.W.2d 480, 488 (Wis. 1975), *citing* Bunbury v. Krauss, 41 Wis. 2d 522, 532 (Wis. 1969). "The theory underlying the part performance rule is that equity will not permit the statute, which was designed to prevent fraud, from being used as instrument of fraud." In re Rogers' Estate, 140 N.W.2d 273, 287-288 (Wis. 1966). "The act of making partial payment . . . [may constitute] part performance, and part performance is a defense to the statute of frauds." Wamser v. Bamberger, 305 N.W.2d 158, 160 (Wis. App. 1981). "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) will be granted where, based upon the pleadings, it appears that the plaintiffs can prove no set of facts to support their claims that they are entitled to relief." Schwinn Cycling & Fitness Inc. v. Benonis, 217 B.R. 790, 795 (N.D. Ill.1997); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Because Pirates has this avenue to relief available, the motion to dismiss must be denied.