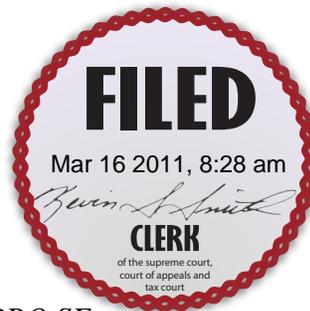


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

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**IN THE
COURT OF APPEALS OF INDIANA**

PIONEER TITLE,)
)
Appellant/Defendant,)
)
vs.) No. 29A02-1004-SC-571
)
CHANDA GARTIN,)
)
Appellee/Plaintiff.)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-0911-SC-2416

March 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant Pioneer Title appeals the Hamilton County small claims court's judgment in favor of Appellee/Plaintiff Chandra Gartin. We affirm.

FACTS AND PROCEDURAL HISTORY

At some point in August or September of 2009, Chandra Gartin and her husband Chad (hereinafter "the Gartins") entered into an agreement to purchase a house in Cicero from Chad and Krista Hughes (hereinafter "the Hugheses"). Prior to closing the real estate transaction, the Gartins discovered a potentially major defect with the hardwood flooring. The Hugheses did not believe there was any defect with the hardwood flooring. In order to resolve the issue, the Gartins and the Hugheses (collectively "the parties") agreed to order an independent inspection of the hardwood floors.

The closing of the real estate transaction was originally scheduled for September 9, 2009, but was subsequently rescheduled for September 11, 2009, because the parties had yet to receive the results of the floor inspection. At some point, it became clear that the inspection report would not be completed before the September 11, 2009 closing date. As a result, the parties agreed to place \$5000 of the purchase price into an escrow account pending the outcome of the floor inspection. Prior to closing, the parties asked Pioneer Title to hold the \$5000 in escrow.

On the afternoon of September 11, 2009, the parties met at a real estate office in Marion County to conduct the closing of the real estate transaction. Pioneer Title was represented by Doug Johnson, who facilitated the closing. The parties signed an addendum to the purchase agreement that stated that since the flooring issues had not been resolved by

closing, Pioneer Title would hold \$5000 in escrow until an agreement was reached. The parties gave the signed addendum to Johnson, and the Gartins made it clear that they would not proceed to closing unless Pioneer Title agreed to hold the \$5000 in escrow until said issues were resolved. Johnson assured them that Pioneer Title would do so, and the parties proceed to close the real estate transaction.

On Monday, September 14, 2009, the lender, Fifth Third Bank, notified Pioneer Title that it did not consent to the signed addendum and instructed Pioneer Title to disburse the funds according to the HUD-1 statement. As a result, Pioneer Title did not hold \$5000 in escrow but released the entire purchase price to the Hugheses. Soon thereafter, the Gartins received the results of the floor inspection which confirmed a major defect with the hardwood floors. Chandra Gartin notified Pioneer Title of the results of the inspection report, submitted the necessary paperwork, and requested that Pioneer Title release the \$5000 to her pursuant to the parties' agreement as outlined in the signed addendum. Pioneer Title informed Chandra Gartin that despite Doug Johnson's assurances, Pioneer Title did not place the \$5000 in escrow because the addendum was not approved by Fifth Third Bank. Pioneer Title further informed Chandra Gartin that all of the funds were distributed to the Hugheses at closing.

Chandra Gartin filed suit against Pioneer Title on November 4, 2009. The small claims court conducted a bench trial on March 24, 2010, at the conclusion of which it took the matter under advisement. On March 26, 2010, the small claims court issued its final judgment in favor of Chandra Gartin. This appeal follows.

DISCUSSION AND DECISION¹

Initially, we note that both Pioneer Title's and Gartin's briefs are completely devoid of citations to the record or relevant authority. We remind the parties that Indiana Appellate Rule 46 requires that factual statements contained in appellate briefs "shall be supported by page references to the Record on Appeal or the Appendix in accordance with [Indiana Appellate] Rule 22," and that each contention raised by the parties on appeal "must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal, in accordance with Rule 22."

The small claims court determined that Gartin was entitled to relief on a theory of promissory estoppel because she relied to her detriment upon Pioneer Title's assurance that it would hold \$5000 of the purchase price in escrow pending the results of the floor inspection. We agree. In *First National Bank of Logansport v. Loan Manufacturing Co.*, 577 N.E.2d 949, 954 (Ind. 1991), the Indiana Supreme Court adopted section 90 of the Restatement (Second) of Contracts which provides:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

The doctrine of promissory estoppel encompasses the following elements: (1) a

¹ To the extent that Pioneer Title contends that venue was not proper in Hamilton County, Indiana Small Claims Rule 12 provides, in relevant part, that venue is proper in the county where the obligation is to be performed. In the instant matter, it was eventually determined that the Gartins, who reside in Hamilton County, were entitled to recover the \$5000. Pioneer Title was therefore obligated to disburse the funds to the Gartins in Hamilton County. Accordingly, Hamilton County is a proper county for venue pursuant to Indiana Small Claims Rule 12.

promise by the promissory; (2) made with the expectation that the promisee will rely thereon; (3) which induces reasonable reliance by the promisee; (4) of a definite and substantial nature; and (5) injustice can be avoided only by enforcement of the promise. *Id.* Thus, a promisor who induces a substantial change of position by the promisee in reliance upon the promise is estopped to deny enforceability of the promise. *Id.* The reason for the doctrine is to avoid an unjust result in that justice and fair dealing require that one who acts to his detriment on the faith of a promise should be protected by estopping denial of that promise. *Id.*

The doctrine of estoppel springs from equitable principles and is designed to aid the law in the administration of justice where, without its aid, injustice might result. Its purpose is to preserve rights previously acquired and not to create new ones. Estoppel is the misleading of a party entitled to rely on the acts or statements in question and a consequent change of position to his detriment. Fraud need not be proven; it is sufficient if the conduct of the party has been knowingly such as would make it unconscionable on his part to deny what his conduct had induced another to believe and act upon in good faith and without knowledge of the facts.

A plaintiff may recover on a theory of promissory estoppel even in the absence of a contract. Promissory estoppel is an exception to the general rule that estoppel is not available upon promises to be performed in the future. The doctrine of promissory estoppel can act as a substitute for lack of consideration or lack of mutuality. Unjust enrichment is not required, and the promisor need not receive any benefit or consideration from the transaction. Whether the promisor's action constitutes a misrepresentation of current fact or an unfulfilled promise as to future action is irrelevant to the application of promissory estoppel.

Id. (citations and quotation marks omitted).

In the instant matter, the record demonstrates that an issue with the hardwood flooring arose prior to closing that led the Gartins and the Hugheses to agree that they would request that Pioneer Title hold \$5000 of the purchase price in escrow pending the outcome of the floor inspection. The record further demonstrates that at closing, the Gartins told Pioneer

Title's representative Johnson that they would not proceed to closing unless Pioneer Title agreed to hold \$5000 in escrow pending the results of the floor inspection, and that the Gartins proceeded to closing only after Johnson assured them that Pioneer Title would do so.

Although Johnson testified that he told the Gartins that his promise to hold the \$5000 in escrow was conditioned upon approval by Fifth Third, the Gartins testified that Johnson did not tell them and, thus, they were not aware that Johnson's assurances were conditioned upon approval by the lender, Fifth Third Bank. In finding for the Gartins, the trial court found that Johnson did not tell the Gartins that his promise was conditioned upon approval by Fifth Third. We will not reweigh this finding on appeal, but rather will consider only the evidence most favorable to the judgment of the small claims court. *See Clark v. Crowe*, 778 N.E.2d 835, 840 (Ind. Ct. App. 2002) (providing that an appellate court neither reweighs the evidence nor assess the credibility of witnesses, but considers only the evidence most favorable to the judgment).

We conclude that in light of the representation by Johnson that Pioneer Title would hold \$5000 in escrow pending the results of the floor inspection and the Gartins' decision to proceed to closing, the small claims court correctly determined that Pioneer Title, through its representative, made a promise of a definite and substantial nature with the expectation that the Gartins would rely thereon, and that the Gartins did in fact rely on Pioneer Title's promise to place the funds in escrow pending the outcome of the floor inspection. At the very least, Johnson, acting as Pioneer Title's representative, should have reasonably expected that the Gartins would rely on his representations, and upon proceeding to closing, should

have known that they did in fact rely on his representations. Therefore, the Gartins should recover from Pioneer Title under the theory of promissory estoppel if injustice can be avoided only by the enforcement of the promise.

We conclude that injustice can only be avoided by enforcement of Johnson's promise that Pioneer Title would hold \$5000 in escrow pending the outcome of the floor inspection. Even though the parties' dealings did not form a contract, Johnson's representations induced the Gartins to reasonably rely on Pioneer Title's willingness to hold the funds in escrow. In reliance of Johnson's representations, the Gartins proceeded to closing on September 11, 2009. Soon thereafter, they received the results of the floor inspection which confirmed a major defect with the hardwood flooring. The Gartins attempted to collect the \$5000 from Pioneer Title. Pioneer Title, however, informed the Gartins that it could not give them the \$5000 because the funds were never been placed in escrow. Pioneer Title told the Gartins that the funds were not placed in escrow because the lender, Fifth Third, has disapproved of the arrangement. The Gartins had not been informed and were unaware that Pioneer Title's promise was conditioned upon approval by Fifth Third.

In light of the Gartins' testimony before the small claims court, we think it is clear that had they known that Pioneer Title would not place the funds in escrow or that its promise was conditioned upon approval by Fifth Third, they would not have proceeded to closing. An injustice would result if the Gartins were penalized for relying on the representations made by Johnson as Pioneer Title's representative when Johnson was aware of and participated in the actions of the Gartins which constitute reliance. *See First National Bank ,*

577 N.E.2d at 955. Therefore, we conclude that all five elements of promissory estoppel are established by the evidence and the small claims court's findings in this regard are affirmed. To the extent that Pioneer Title's challenge on appeal amounts to an invitation to reweigh the evidence, we decline to do so. *See Clark*, 778 N.E.2d at 840.

The judgment of the small claims court is affirmed.

KIRSCH, J., dissents with opinion.

CRONE, J., concurs.

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)	
CHANDA GARTIN,)	
)	
Appellee-Plaintiff.)	

Kirsch, Judge, *dissenting*.

I respectfully dissent.

The transaction that gave rise to the plaintiff’s claim took place entirely in Marion County, and that is where the defendant has its place of business.² There is nothing to indicate that the resulting obligation was to be performed in Hamilton County. The five thousand dollars that the sellers and Chanda Gartin agreed would be placed in escrow pending resolution of the flooring dispute was to be held by Pioneer Title in Marion County. Upon a resolution of the dispute, Pioneer was to disburse such funds from its office in Marion County to either the sellers or the buyer. Upon such disbursal, Pioneer’s obligation would be fully satisfied.

I believe the trial court erred in denying the motion of Pioneer Title, LLC to transfer this case to Marion County as the county of preferred venue under Small Claims Rule 12 (A).

I would vacate the trial court’s judgment and remand with instructions to order the transfer of this case to Marion County.

² Although the defendant’s primary place of business in Indiana may be in Boone County, that does not affect our decision here.

