IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1939

KENNETH A. BLOW,

Plaintiff-Appellant,

versus

WILLIAMS ADLEY & CO.,

Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Texas
(3:92-CV-2239-R)

(September 19, 1994)

Before REAVLEY, DAVIS and DeMOSS, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Kenneth Blow claims that he is entitled to a finder's fee pursuant to an oral agreement with Williams, Adley & Co. (Williams), a minority owned accounting firm. The district court granted summary judgment for Williams on the ground that the agreement was barred by the statute of frauds. We reverse.

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

We credit Blow's account of events, as we must in reviewing the summary judgment. Blow originally contacted Tom Williams and Henry Adley in February, 1989, to discuss the possibility of Blow marketing their accounting services. Blow was promised a 10% fee on any business which was brought to the Williams firm and accepted. Blow met with partner Henry Adley in November, 1989, and Adley allegedly reiterated his promise to give Blow a 10% fee for any referral resulting in a successful business deal. Blow was not a social acquaintance of the partners at Williams and there was no further communication between the parties until April, 1992.

On April 9, 1992, Blow was visiting Electronic Data Systems Corporation ("EDS") on an unrelated matter when he learned of a possible business opportunity for Williams involving a contract between EDS and the Resolution Trust Corporation. According to Blow, he then recommended Williams to an EDS representative and called Henry Adley to confirm the existence of the 10% finders fee agreement. After Adley assured Blow that the agreement was valid and that Blow would be paid a fee for any contract that Williams consummated with EDS, Blow put Adley and EDS directly in contact. EDS had not previously heard of the Williams firm and had not previously met Henry Adley or Tom Williams. As a result of this introduction, the Williams firm eventually entered into a joint venture contract with EDS, Maria Elena Torano Associates,

and the RTC valued at approximately $75,000,000. Blow did not receive a finder's fee or any other remuneration from the firm.

Blow sued, and the district court granted summary judgment for Williams on the ground that the contract was within the statute of frauds because it could not be performed within a year. The district court considered the length of the ensuing contract between EDS and the RTC determinative, stating that "the agreements between EDS and the RTC typically extend beyond one year." The judge further concluded that Blow had not fully performed under the alleged contract on the ground that "performance continues as long as the obligation to provide a finder's fee exists." We reverse.

DISCUSSION

Texas courts have consistently held that if the time for performance in an oral agreement is uncertain and performance can possibly occur within one year, the statute of frauds is inapplicable, even if performance within a year is improbable. E.g., Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775 (Tex. 1974). We conclude that the oral agreement between Williams and Blow is not barred by the statute of frauds because it could possibly be performed within a year under Texas law. The district court reached a contrary conclusion by improperly focusing on the length of the ensuing contract between EDS and Williams, instead of focusing on the contract between Williams and Blow. Under Blow's account the 1992 agreement was in fact performed within one year, although we could enforce performance

of the 1989 agreement, since Williams could have accepted business referred by Blow within the period of a year from the earlier date. Once Williams accepted the business, Blow was not under any continuing obligation to refer further business.

Williams argues that the contract still falls within the statute because Blow would have to be paid the finders fee over several years in accordance with the extended length of the resulting contract between EDS and Williams, and that there is a potential for future contracts between EDS, the RTC and Williams in which there would be an obligation to pay Blow. But a practice of not compensating Blow for the services he rendered until after the year in question does not bring the contract within the statute as long as full performance within a year is possible. See Miller, 517 S.W.2d at 776. At the immediate time the contract between Blow and Williams was made, it could have been performed within a year, regardless of any subsequent structured payout to Blow and regardless of any future contracts that might occur between EDS and Williams. See Goodwin v. SouthTex Land Sales, 243 S.W.2d 721, 725 (Tex. Civ. App. -- San Antonio 1951, writ ref'd n.r.e) (explaining that to fall within statute of frauds, the agreement must be one of which it can "truly be said at the very moment that it is made" that the agreement cannot be performed within a year.)

We do not determine that a valid contract existed or that Blow is entitled to victory on the merits; we merely hold that

summary judgment based on the statute of frauds was improper under this record.

REVERSED and REMANDED for further proceedings consistent with this opinion.