

No. 1-10-3035

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

J. LOUIS DESANTO,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 10 L 1534
)	
CENTERPOINT PROPERTIES TRUST, a real estate)	
investment trust,)	Honorable,
)	Charles R. Winkler,
Defendant-Appellee.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Karnezis concurred with the judgment.

ORDER

¶ 1 **HELD:** We affirmed the section 2-615 dismissal of plaintiff's complaint seeking damages relating to defendant's failure to pay a real estate commission allegedly due under an exclusive listing agreement.

¶ 2 Plaintiff, J. Louis DeSanto, a licensed real estate salesperson affiliated with Colliers, Bennet & Kahnweiler (CBK), a real estate broker, appeals from the dismissal with prejudice of his complaint against defendant, Centerpoint Properties Trust, a real estate investment trust, seeking damages relating to the failure of defendant to pay commission allegedly due under an exclusive listing agreement. We affirm.

¶ 3

FACTUAL BACKGROUND

¶ 4

The Exclusive Listing Agreement

¶ 5 Defendant and CBK entered into an agreement with a stated term of one year beginning in December 2000, which gave CBK the exclusive right to sell or lease a large parcel of property owned by defendant and being developed as the Joliet Arsenal Project. Although plaintiff had been affiliated with CBK since 1987, the agreement provided that David R. Kahnweiler was CBK's designated agent "to the exclusion of all brokers or salespersons employed or affiliated" with CBK unless CBK informed defendant, in writing, of any additional designated agent, and defendant approved.

¶ 6

Defendant agreed to pay CBK a commission if, during the term of the agreement, a lease or sale of the property was executed through the services and efforts of CBK, defendant or any other person. Defendant also was to pay a commission to CBK for a lease or sale executed within six months after termination of the agreement with a prospective tenant or buyer submitted by CBK or anyone with whom defendant dealt during the term of the agreement if CBK identified the prospective tenant or buyer within ten (10) days after the agreement's termination. The agreement included a schedule setting forth the manner of determining the amount of commission depending on the type of resulting transaction. Defendant agreed to cooperate fully with CBK, refer all inquiries pertaining to the property to CBK, and conduct all negotiations through CBK. All amendments to the agreement were required to be in writing and signed to be binding.

¶ 7

Walmart Dispute

¶ 8

Defendant's negotiations with Walmart in 2004 as to a sale or lease of a portion of the property gave rise to the dispute which is the subject of the complaint. Without documentation or

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factual support, plaintiff contended the exclusive listing agreement had been "extended from time to time and finally terminated in 2005." Plaintiff contended that, during the term of the agreement, he "approached Walmart and discussed Walmart with the defendant as a potential purchaser of a portion of the property."

¶ 9 According to the complaint, in August 2004, Neil Doyle, an employee of defendant, told plaintiff that defendant "was working on a potential deal with a 'big box retailer' " and "specifically requested that the plaintiff not be involved and specifically requested that the plaintiff not involve anyone else from CBK in this potential deal." Plaintiff further alleged that Mr. Doyle, "on behalf of the defendant, specifically promised the plaintiff that CBK would receive commissions if the aforesaid transaction was consummated and assured the plaintiff that he would receive his *pro rata* share of its commission from CBK." Plaintiff contended Walmart was "the big box" retailer. Plaintiff maintains he relied on Mr. Doyle's promises and did not get involved and did not get anyone else from CBK involved in Walmart negotiations.

¶ 10 CBK sent defendant two letters: one dated April 1, 2005, and the other dated April 14, 2005. In the April 14 letter, CBK stated its disappointment that it would no longer be representing defendant's interests. Both letters identified Walmart, among other entities, as a prospect for which CBK sought "protection *** as exclusions under the terms of our agency agreement" for a period of 120 days (the April 1 letter) or 180 days (the April 14 letter). CBK stated in the April 14 letter: "[w]e have allocated what we feel is an acceptable protection period based on the relative strength of the prospect and likelihood of a transaction."

¶ 11 Plaintiff alleged defendant subsequently leased and then sold a portion of the property to Walmart, but did not pay a commission to CBK. Plaintiff contended defendant gave as the "reason"

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for its non-payment of commission that CBK had not been involved in the Walmart transaction. Plaintiff claimed to be one of the designated agents as to the agreement, and, therefore, was entitled to receive a portion of any commission defendant paid to CBK. In support of this allegation, plaintiff attached to the complaint, a February 25, 2000, email from David Kahnweiler which said: "Chuck Canale, Lou DeSanto and I have been appointed by CenterPoint Properties to serve as their exclusive marketing agent" for the Joliet Arsenal Project. However, the email predates the agreement and defendant was not the recipient. Plaintiff concluded that his share of the commission to CBK would have been in excess of \$1,000,000, but has not factually supported this calculation.

¶ 12 Complaint and Dismissal

¶ 13 In his complaint filed on February 3, 2010, plaintiff asserted three theories of liability against defendant. Count I raised a claim of promissory estoppel and alleged plaintiff reasonably relied on Mr. Doyle's promise and did not get involved in the Walmart negotiations, and defendant breached its promise by failing to pay CBK commissions. Count II, a tortious-interference claim, alleged defendant interfered with plaintiff's reasonable business expectancy to share in commission owed to CBK. Finally, in count III, plaintiff claimed defendant, as part of a scheme, made a false representation as to the payment of a commission giving rise to a fraud claim. Plaintiff, in each count, sought actual damages in excess of \$1,000,000 for his share of commissions owed to CBK. Counts II and III alleged malice, and also sought punitive damages of \$3,000,000.

¶ 14 Defendant moved to dismiss the complaint under section 2-615 of the Code of Civil Procedure. 735 ILCS 5/2-615 (West 2010). Defendant first argued that plaintiff's causes of action were barred by section 10-5(b) of the Real Estate License Act of 2000 (Act), which prohibits a licensed real estate salesperson from receiving compensation for any of the activities set forth in the

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Act from anyone "except from the broker by whom the licensee is sponsored," (225 ILCS 454/10-5(b) (West 2010)) and the holding in *Greiner v. Dominick's Finer Foods, Inc.*, 273 Ill. App. 3d 1037 (1995), which interpreted a prior version of this section to prohibit a plaintiff-salesperson from recovering on a commission agreement made directly with the seller of property. Defendant also argued plaintiff had failed to sufficiently allege causes of action. In opposition to the motion to dismiss, plaintiff argued that section 10-5(b) did not apply because he was not seeking actual commission from defendant, but instead was requesting damages for his lost commission, and that his complaint was adequately pled.

¶ 15 The trial court, after hearing arguments on the applicability of section 10-5(b) and the decision in *Grenier*, granted the motion to dismiss with prejudice and said:

"What you're asking me to do is to disregard that statute and say, yes, you get around it because you had direct contact with somebody, and therefore a promise was made that you're going to get paid some money. But there's no way that the law allows that to take place.

So when you're talking about the commission, there was no commission. There was nothing there. Nothing tendered. No pie to cut up."

¶ 16 Plaintiff filed this timely appeal from the dismissal.

¶ 17 On appeal, plaintiff argues his complaint was dismissed in error as he had adequately pled causes of action against defendant for promissory estoppel, tortious interference and fraud, and the holding in *Grenier* does not bar his claim for promissory estoppel. Defendant, in response, argues that *Grenier* prevents plaintiff from recovering under all asserted theories of liability and the complaint does not adequately plead causes of action.

¶ 18

ANALYSIS

¶ 19 A section 2-615 motion to dismiss "admits all well-pleaded facts, but does not admit conclusions of law or conclusions of fact not supported by allegations of specific facts." *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill. 2d 281, 289 (1990). In considering such a motion to dismiss, a court must determine " 'whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted.' " *Seip v. Rogers Raw Materials Fund, L.P.*, 408 Ill. App. 3d 434, 438 (2011) (quoting *Canel v. Topinka*, 212 Ill. 2d 311, 317 (2004)). All well-pled facts, on the face of the pleadings, as well as any exhibits attached thereto, are to be considered. *Behringer v. Page*, 204 Ill. 2d 363, 365 (2003). We review an order granting a section 2-615 dismissal *de novo*. *Seip*, 408 Ill. App. 3d at 439.

¶ 20

The Real Estate License Act

¶ 21 The Act (225 ILCS 454/1-1 *et seq* (West 2010)) regulates the real estate business (225 ILCS 454/1-5 (West 2010)), and clarifies "the relationships between real estate brokers and salespersons and consumers of real estate brokerage services." (225 ILCS 454/15-5 (West 2010)). The Act is remedial in nature and must be liberally construed. See *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 390 (1982) (discussing prior act).

¶ 22

The following provisions of the Act are relevant to the issues. A real estate broker engages in the business of buying, selling, or leasing real property for another and for compensation. 225 ILCS 454/1-10 (West 2010). A real estate salesperson "is employed by a real estate broker or is associated by written agreement with a real estate broker as an independent contractor and participates in any activity described in the definition of 'broker' under this Section." 225 ILCS

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454/1-10 (West 2010). A broker who has an independent-contractor relationship with, or sponsors a licensed real estate salesperson, must have a written agreement with the salesperson setting forth such terms as the salesperson's compensation. 225 ILCS 454/10-20(b), (c) (West 2010). Additionally, a written brokerage agreement for the sale or lease of property must "provide for automatic expiration within a definite period of time." 225 ILCS 454/10-25 (West 2010). The broker's agreement for the sale or lease of property "may specifically designate those licensees employed by or affiliated with the sponsoring broker who will be acting as legal agents of that person to the exclusion of all other licensees employed by or affiliated with the sponsoring broker." 225 ILCS 454/15-50(a) (West 2010).

¶ 23 As discussed, section 10-5(b) states: "[no] licensee sponsored by a broker shall accept compensation for the performance of activities under this Act except from the broker by whom the licensee is sponsored***." 225 ILCS 454/10-5(b) (West 2010). The Act defines compensation as "the valuable consideration given by one person or entity to another person or entity in exchange for the performance of some activity or service." 225 ILCS 454/1-10 (West 2010).

¶ 24 Promissory Estoppel

¶ 25 Promissory estoppel is a common-law doctrine which has been incorporated into section 90 of the Restatement (Second) of Contracts which states:

"A promise which the promiser 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." Restatement (Second) of Contracts §901(1), at 242 (1981); *Newton Tractor Sales, Inc. v. Kubota Trailer Corp.*, 233 Ill. 2d 46,

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51 (2009).

The elements of a promissory-estoppel action are: "(1) defendant made an unambiguous promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Id.* at 51. The plaintiff's reliance must be reasonable and justifiable. *Quake Construction, Inc.*, 141 Ill. 2d at 310.

¶ 26 Plaintiff argues he has adequately stated a claim for promissory estoppel in accordance with *Newton*. Plaintiff alleges Mr. Doyle represented to him that defendant did not want plaintiff or CBK involved in ongoing negotiations with Walmart but would pay commissions to CBK, and plaintiff would receive his *pro rata* share of the commissions from any deal executed with Walmart. Plaintiff also alleged that, in reliance on these representations, he did not become involved in negotiations with Walmart and did not have CBK get involved. Plaintiff seeks damages as a result of defendant's failure to pay CBK commissions based on an eventual unspecified lease and sale transaction with Walmart allegedly because the transaction was done without CBK's participation.

¶ 27 The trial court found that the promises set forth in the complaint were not enforceable in light of the prohibition set forth in section 10-5(b) and the holding in *Greiner*. We agree.

¶ 28 The plaintiff in *Greiner* was a licensed real estate salesperson employed by a licensed broker. *Greiner*, 273 Ill. App. 3d at 1038. He and the sellers reached an oral agreement for the payment of commissions if the plaintiff was instrumental in procuring a purchaser. *Id.* at 1038. The sellers agreed to sell the property to persons procured by the plaintiff. *Id.* at 1038-39. The plaintiff was never informed of the closing and did not receive any commission. *Id.* at 1039. He brought suit against the sellers on the oral agreement to pay commissions. *Id.*

¶ 29 The appellate court upheld summary judgment in favor of the sellers based on the Real

Estate Brokers and Salesmen License Act and its successor, the Real Estate License Act of 1983, each of which contained provisions stating that no licensed real estate salesperson shall accept a commission or valuable consideration for the performance of any of the specified activities from any person, except the licensee's employer, a licensed broker. *Id.* at 1042 (citing Ill. Rev. Stat. 1981, ch. 111, par. 5727(d); Ill. Rev. Stat. 1983, ch. 111, par. 5812(d)). The court found these provisions were intended to "preclude[] a real estate salesperson from dealing directly with a broker's client and from collecting the commission on his own behalf." *Id.* at 1043. The plaintiff had not alleged the existence of an agreement with the plaintiff's broker and the seller "who would, in turn, compensate the plaintiff in the appropriate amount." *Id.* The oral agreement was found to be void and unenforceable because "[the] plaintiff dealt directly with" the sellers "and expected to receive his commission from them", "an arrangement *** prohibited under the licensing statutes." *Id.*

¶ 30 The plaintiff, in *Grenier*, was denied leave to file an amended complaint, which included claims for third-party beneficiary, *quantum meruit*, unjust enrichment, breach of implied contract, and interference with the plaintiff's contractual rights. *Id.* at 1041.

¶ 31 In affirming the denial, the appellate court held:

"Allowing plaintiff to proceed under the theories presented in the proposed amended complaint would circumvent the statutory sections which prohibit a salesperson from dealing directly with a client. [Citation.] It is axiomatic that the law will not allow a party to do indirectly that which he is precluded from doing directly." *Id.* at 1044.

¶ 32 Plaintiff here, a licensed real estate salesperson employed by CBK, is seeking to impose liability for damages for his lost commissions based on oral promises made directly to him by defendant, the seller/client of CBK. There were no allegations that CBK was involved in the

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discussions with Mr. Doyle. Plaintiff's claim is contrary to the Act's scheme setting forth and clarifying the relationships of buyers/sellers, brokers and salespersons and the strict prohibitions of section 10-5(b). By asserting his promissory-estoppel claim plaintiff is seeking to do indirectly what he cannot do directly under section 10-5(b) of the Act. The alleged promise of Mr. Doyle can not be enforced without violating the purpose and intent of the Act - prevention of salespersons dealing directly with sellers on the issue of commission. *Id.* at 1043. Plaintiff's argument that section 10-5(b) and *Grenier* do not apply because he is seeking "damages in the amount of commissions and not the actual commissions" is unpersuasive.

¶ 33 Furthermore, plaintiff has failed to allege facts showing he has suffered detriment in reliance on the promises of Mr. Doyle.

¶ 34 Plaintiff's claim turns on his contention that defendant did not pay commission because CBK had no involvement in the Walmart transaction. Although the agreement provided that negotiations were to be conducted by CBK, commission was to be paid based on a sale or lease executed during the term of the agreement through the efforts of CBK, defendant or any other person, or within a distinct period of time after termination of the agreement with a prospective buyer or tenant who defendant dealt with during the agreement's term, and was properly identified by CBK. Defendant's payment of commission did not depend on whether CBK or its designated agent was involved in the negotiations if the transaction, otherwise, fell within the commission provisions.

¶ 35 Plaintiff alleged he suffered damages because defendant did not pay commissions to CBK as required under the agreement. Plaintiff, however, has failed to set forth sufficient facts to establish defendant's obligation to pay CBK commissions. Mr. Doyle made representations about Walmart in 2004, a time well beyond the stated term of the agreement. Plaintiff's allegation that the

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agreement was extended from time to time and terminated in 2005 is unsupported by well-pled facts. Plaintiff has not pled that defendant entered into a lease or sale with Walmart within the term of the agreement or within the specified period after the termination of the agreement so that commissions would be due. Plaintiff has not set forth sufficient factual pleadings to support his contention that he would have been owed a portion of the commission paid to CBK. Plaintiff's allegation that he was a designated agent under the agreement and, therefore, entitled to a portion of any commission, is unsupported. Plaintiff was not listed in the agreement as a designated agent and has not pled that the agreement was modified in writing to show defendant's approval of him as a designated agent. Finally, plaintiff has failed to plead that he had a written employment agreement with CBK and has not pled what if any agreement he had with CBK which would have provided him with a share of any commission paid to CBK under the agreement.

¶ 36 Plaintiff's complaint does not plead a promise which can support a claim for promissory estoppel and fails to allege detrimental reliance thereon. We affirm the dismissal of count I.

¶ 37 Tortious Interference

¶ 38 Plaintiff next argues that he adequately pled a tortious-interference claim against defendant. He claims defendant interfered with his reasonable expectancy of receiving commissions on a transaction with Walmart. The elements of an action for tortious interference with a contractual relationship are: "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) the defendant's awareness of the contract; (3) the defendant's intentional and unjustified inducement of a breach of the contract; and (4) a subsequent breach by the other, caused by the defendant's conduct; and (5) damages." *Complete Conference Coordinators, Inc. v. Kumon North America, Inc.*, 394 Ill. App. 3d 105, 109 (2009). Plaintiff has not stated a claim for tortious

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interference.

¶ 39 Plaintiff asserts defendant's conduct interfered with his share of CBK's commission, but does not set forth pleadings establishing a contract agreement he had with CBK. Plaintiff alleges only that he was affiliated with CBK beginning in 1987. There are no facts pled showing the existence of a written employment agreement containing compensation terms or his rights to share in any commissions paid to CBK. Such an agreement was required under the Act. 225 ILCS 454/10-20(b), (c) (West 2010). Furthermore, plaintiff alleges an expectancy of a share in a Walmart commission because he was a designated agent of CBK under the agreement. However, as we previously discussed, plaintiff is not listed as a designated agent in the agreement and there are no allegations that defendant approved of any request by CBK to add him as a designated agent.

¶ 40 Additionally, there are no allegations that defendant intentionally and unjustifiably induced CBK not to pay plaintiff any commission he may have been owed as a salesperson affiliated with CBK. As the trial court noted, defendant did not pay CBK commission for the Walmart deal, so there "was no pie to cut up." Further, the complaint does not contain a factual basis for showing defendant was obligated to pay commission under the agreement and, therefore, plaintiff has not pled defendant's failure to pay commission was wrongful.

¶ 41 As to the element of damages, as we have previously discussed, because plaintiff has not sufficiently pled commission was even owed to CBK, he has not adequately pled his claim of damages from loss of commissions. We find the dismissal of count II was proper.

¶ 42 Fraud

¶ 43 Plaintiff seeks to recover damages on a fraud theory based on defendant's alleged promise to pay CBK commission and assure plaintiff's share of the commission on any completed transaction

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with Walmart. To state a cause of action for fraud a plaintiff must assert a false statement of material fact; knowledge by the defendant that the statement was false; defendant's intent that the statement induce the plaintiff to act; the plaintiff's reliance on the truthfulness of the statement; and damages that resulted from reliance on the statement. *Napcor Corp. v. JP Morgan Chase Bank, NA*, 406 Ill. App. 3d 146, 153-54 (2010). However, misrepresentations of intention to perform future conduct, even if made without a present intention to perform, do not generally constitute fraud. *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill. 2d 145, 168 (1989). An exception to this rule is found when the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud. *Id.*

¶ 44 Plaintiff concedes that his fraud claim is based on representations of future conduct but argues that his claim, as pled, falls within this scheme exception. We disagree.

¶ 45 Plaintiff has alleged, only in conclusory fashion, that Mr. Doyle made his alleged misrepresentation, "as part of a scheme." Plaintiff has not set forth specific allegations in support of his allegation of a scheme. The complaint asserts representations made by one employee of defendant at one time, and these allegations do not establish Mr. Doyle's representations were a scheme or device on the part of defendant to accomplish fraud.

¶ 46 Further, as we discussed earlier as to the promissory-estoppel claim, plaintiff's complaint fails to adequately allege the element of damages resulting from reliance on Mr. Doyle's representations. Plaintiff has failed to state a cause of action in fraud against defendant. Dismissal of count III was not in error.

¶ 47 Because we have found plaintiff has not stated claims for tortious interference or fraud, we do not address defendant's arguments that *Grenier*, and section 10-5(b) of the Act bar these causes

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of action.

¶ 48

Dismissal With Prejudice

¶ 49 The trial court dismissed the complaint with prejudice. Generally, "an initial pleading should be dismissed with prejudice under section 2-615 only if it is clearly apparent that no set of facts can be proven that will entitle the plaintiff to recover." *Blazyk v. Daman Express, Inc.*, 406 Ill. App. 3d 203, 209 (2010). Plaintiff has not presented any arguments on appeal as to the trial court's decision to grant defendant's motion to dismiss with prejudice and, therefore, has forfeited any challenge to this issue. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Because the complaint did not state a cause of action, and plaintiff never proposed amendments to his complaint in the trial court, we affirm the dismissal with prejudice. *Bellik v. Bank of America*, 373 Ill. App. 3d 1059, 1065-66 (2007).

¶ 50 For the reasons stated, we affirm the dismissal of the complaint, in its entirety, with prejudice.

¶ 51 Affirmed.