

NOTICE

Decision filed 07/12/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 100137-U  
NO. 5-10-0137  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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MARIAN HUTNICK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 00-MR-100
	)	
DENNIS WATKINS, Substituted Party for	)	
Lillian E. Beil, Deceased,	)	Honorable
	)	Walter C. Brandon, Jr.,
Defendant-Appellee.	)	Judge, presiding.

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JUSTICE STEWART delivered the judgment of the court.  
Justices Welch and Wexstten concurred in the judgment.

**ORDER**

- ¶ 1           *Held:* The circuit court properly entered a summary judgment in favor of the defendant because the plaintiff failed to allege or present any evidence to show detrimental reliance, a necessary element of her claim of promissory estoppel. Additionally, the plaintiff was not denied due process by the trial court's failure to conduct a hearing prior to entry of a summary judgment in favor of the defendant, and any issue regarding application of the Dead-Man's Act (735 ILCS 5/8-201 (West 2004)) is irrelevant to our ruling affirming the court's grant of a summary judgment to the defendant.
- ¶ 2           The plaintiff, Marian Hutnick, appeals from an order of the circuit court granting a summary judgment in favor of the defendant, Dennis Watkins, whom the court substituted as the defendant in place of Lillian E. Beil (Mrs. Beil), who died on November 13, 2006. Mrs. Beil was the mother of Marian Hutnick. The issues on appeal are as follows: (1) whether the trial court properly granted a summary judgment in favor of the defendant, (2) whether the plaintiff was denied due process

because the trial court entered a summary judgment in the defendant's favor without first conducting a hearing on that motion, and (3) whether Watkins had standing to raise issues regarding the application of the Dead-Man's Act (735 ILCS 5/8-201 (West 2004)). We affirm.

¶ 3

### BACKGROUND

¶ 4

This case commenced on April 25, 2000, when the plaintiff filed her original complaint seeking a declaratory judgment concerning an offer the plaintiff alleged Mrs. Beil had made to her on April 19, 1997. On February 26, 2001, the plaintiff filed a second amended complaint alleging as follows:

"In keeping with the custom of defendant and her late husband of making funds available to their three children to buy houses, defendant did on April 19, 1997, in Belleville, Illinois[,] make the following offer to plaintiff, her daughter:

Defendant would give to plaintiff whatever funds plaintiff needed to buy a new house, those funds would always be there and available, and all plaintiff had to do was ask for those funds. Plaintiff accepted that offer; and in doing so, plaintiff relied on the fact defendant was her mother and this offer was in keeping with the custom of both of her parents of making funds available to their three children. Plaintiff's reliance on the representations made by her own mother and plaintiff's reliance on the well established practices within the family were certainly expected and foreseeable by defendant."

¶ 5

The plaintiff alleged that she relied on her mother's April 19, 1997, promise "to her detriment," although she did not allege any facts in support of that allegation. She alleged that she had made a formal request and demand "for funds totaling \$300,000" but that the defendant "failed and refused to provide those funds."

¶ 6

On March 14, 2001, the defendant filed a motion to dismiss the second

amended complaint, arguing that the complaint failed to state a cause of action based on promissory estoppel because it included "*no* allegation of any *fact* indicating what Plaintiff did in reliance on Defendant's alleged promise. (Merely not getting the money allegedly promised is not proof of detrimental reliance.)" (Emphasis in original.)

¶ 7 In June 2001, the plaintiff filed a "Supplemental Memorandum of Law in Support of Her Claim Based on Promissory Estoppel," arguing that she relied on her mother's promise to her detriment because she "could have had \$300,000.00 on April 19, 1997 or shortly thereafter" but that she "chose instead to wait and only then found out she was being denied the money." The plaintiff argued as follows: "The injury is clear. The situation is just that simple, and the plaintiff's amended pleading satisfies the requirements of law."

¶ 8 On August 21, 2001, the trial court entered an order denying the defendant's motion to dismiss, finding that the plaintiff's claim of promissory estoppel was "appropriately plead [*sic*]."

¶ 9 After both parties alleged that Mrs. Beil was incompetent to testify, the trial court appointed an attorney, Dennis Watkins, to serve as her guardian *ad litem*. Watkins traveled to New York and met with Mrs. Beil and her physicians. On June 14, 2005, Watkins filed a report stating his opinion that Mrs. Beil lacked "sufficient understanding or capacity to make responsible decisions concerning the care of her person or the handling of her affairs, all causing her to be under a legal disability."

¶ 10 On August 1, 2005, the defendant filed a motion to dismiss, arguing that Mrs. Beil's legal incapacity precluded testimony concerning any conversations with her, pursuant to the Dead-Man's Act (735 ILCS 5/8-201 (West 2004)). On November 13, 2006, Mrs. Beil died. On November 17, 2006, the plaintiff filed a motion for

substitution of party, requesting the court to substitute the personal representative of her estate as the proper defendant. On December 5, 2006, the defendant's attorney filed a motion to strike the plaintiff's motion for substitution of party, arguing that Mrs. Beil had been a resident of the state of New York at the time of her death, that probate proceedings would be commenced in New York, and that any claim against her estate should be filed there. On December 18, 2006, the trial court took the defendant's motion to strike under advisement, denied the plaintiff's motion for substitution of party, and allowed an immediate appeal pursuant to Supreme Court Rule 304(a) (eff. Jan. 1, 2006).

¶ 11 On December 31, 2007, this court entered an order holding that "the plaintiff's cause of action for promissory estoppel survived Beil's death and that the circuit court erred in denying her motion for a substitution of party." *Hutnick v. Beil*, No. 5-06-0684, order at 4 (2007) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)). We reversed the trial court and remanded for further proceedings.

¶ 12 After the remand, there is nothing in the record to indicate any activity or pleadings by either party until December 8, 2009, when the plaintiff filed a notice of setting on her motion for substitution of parties. On January 12, 2010, the court entered an order substituting Dennis Watkins "as defendant for Lillian Beil in keeping with Rule 23 Order of the Appellate Court." The court also considered and denied the defendant's motion to dismiss and ordered the plaintiff to be deposed.

¶ 13 On January 26, 2010, the plaintiff filed a motion for a summary judgment, arguing that the court had all of the evidence before it to make a final ruling on the case, whether by granting her motion for a summary judgment and awarding her "\$300,000.00 as and for an amount to be used to purchase a house of her choice" or by granting the defendant's motion for a judgment on the pleadings. The plaintiff

acknowledged that the court could find "the Dead Man's Act dispositive of the case and rule against the plaintiff." The plaintiff stated: "There is no need for a trial. If the Court sees fit to rule in favor of plaintiff, then plaintiff would have no objection with the Court granting the defendant the right to immediately appeal. If the Court sees fit to rule in favor of defendant, then plaintiff would request that it be identified as a final order for purposes of appeal."

¶ 14 On February 17, 2010, the plaintiff filed a motion to quash a notice by which the defendant sought to take her deposition. The court denied that motion, and on February 19, 2010, the plaintiff was deposed. In that deposition, the plaintiff testified, in relevant part, about the actions she took in reliance on her mother's alleged promise to give her the money to buy a new house. She testified as follows:

"Q. [Defendant's attorney:] When she [Mrs. Beil] made this promise to you in April of 1997, was she the only one that made it, or did Joe [the plaintiff's father] make it too?

A. They had both over the years said this many times. So if my mother mentioned it, there would be no reason for my father to repeat it after her.

Q. So it had always been your mother making the promise?

A. No, both.

Q. Okay. In your lawsuit on April 19, 1997, who made the promise?

A. My mother.

Q. Who heard her make the promise?

A. My father, my husband, myself.

Q. Okay. Did you look at any houses?

A. Yes.

Q. Did you go in them?

A. Yes.

Q. Did you put any money down?

A. No.

Q. Did you put your house up for sale?

A. No.

Q. Did you write any contracts, either contingent or any other method?

A. No."

¶ 15 On March 1, 2010, Dennis Watkins, as the substituted party for Mrs. Beil, filed a motion for a summary judgment, arguing that the plaintiff's sole cause of action was for promissory estoppel, which "is comprised of two key elements—(1) the making of an unambiguous promise by a promisor; and (2) detrimental reliance by the promisee on that promise." Watkins argued that the plaintiff had "twice admitted that she did not, in fact, detrimentally rely on her mother's alleged promise." In support of his motion for a summary judgment, Watkins quoted the above testimony from the plaintiff's deposition and attached a copy of the plaintiff's answers to interrogatories. In response to an interrogatory asking the plaintiff to state what, if any, specific steps she took in reliance on her mother's promise to make a gift to her, she stated, "None because this was not to be a gift." Watkins argued that there was no genuine issue of fact that the plaintiff did not detrimentally rely on her mother's alleged promise and, as a result, that the defendant was entitled to a judgment as a matter of law. In the alternative, Watkins alleged that the plaintiff had failed to submit any admissible evidence of Mrs. Beil's alleged oral promise and that the defendant was entitled to a summary judgment on that basis as well.

¶ 16 On March 15, 2010, the trial court entered an order stating that it had considered the parties' arguments and memoranda of law, denying the plaintiff's

motion for a summary judgment, and granting the defendant's motion for a summary judgment. On March 19, 2010, the plaintiff filed a notice of appeal from the court's March 15, 2010, order. The plaintiff did not file a motion to reconsider or any other pleading in the trial court before filing her notice of appeal.

¶ 17

#### ANALYSIS

¶ 18

The plaintiff argues that the trial court erred in denying her motion for a summary judgment because she "established by clear, substantial circumstantial evidence" that she was entitled to the funds for a new house. She contends that she submitted undisputed proof regarding her mother's promise to provide her with the funds for the purchase of a new house. She does not claim, however, that she alleged any facts or presented any evidence in the trial court to show that she detrimentally relied on her mother's promise. It is that lack of evidence that supports the trial court's grant of a summary judgment in favor of the defendant.

¶ 19

A summary judgment is a drastic remedy that should be granted with caution. *Johnson v. Owens-Corning Fiberglass Corp.*, 284 Ill. App. 3d 669, 673 (1996). It is far less drastic, however, when it is entered after lengthy trial court proceedings, as in the case at bar. A summary judgment should be granted only when the pleadings, depositions, admissions, and affidavits on file show that there is no genuine issue of material fact and that the movant is entitled to a judgment as a matter of law. *Hussung v. Patel*, 369 Ill. App. 3d 924, 930-31 (2007). The movant's right to a summary judgment must be clear and free from doubt. *Id.* at 931. The reviewing court is to construe all of the pleadings and the evidence strictly against the movant and liberally in favor of the nonmoving party. *Id.* A defendant can obtain a summary judgment by simply establishing that the plaintiff cannot prove a necessary element of his or her cause of action. *Johnson*, 284 Ill. App. 3d at 677. While a plaintiff is not

required to prove her case at the summary judgment stage, "she must present enough evidence to create a genuine issue of fact." *Hussung*, 369 Ill. App. 3d at 931. Our review of an order granting a summary judgment is *de novo*. *Id.*

¶ 20 In the case presented to us, both parties requested a summary judgment, with the plaintiff arguing that she was entitled to a summary judgment because she had presented un rebutted evidence of her claim and the defendant arguing that the plaintiff could not prove her claim due to the constraints of the Dead-Man's Act and due to her failure to present any evidence to show detrimental reliance, a necessary element of promissory estoppel. Where, as here, the parties file cross-motions for a summary judgment, they invite the court to decide the issues as questions of law, and the entry of a summary judgment for one or the other may be proper. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 949 (2009). The record in our case clearly indicates that, before the defendant filed his motion for a summary judgment, the plaintiff urged the trial court to immediately dispose of the case without a trial. However, even if the parties file cross-motions for a summary judgment, the court is not obligated to grant a summary judgment because it is possible that neither party has alleged facts sufficient to warrant a judgment as a matter of law. *Id.* "It is also possible that, despite the parties' invitation to the court to decide the issues as questions of law, a genuine issue of material fact may remain." *Id.*

¶ 21 In order to establish a claim of promissory estoppel, the plaintiff must prove that (1) the defendant made an unambiguous promise to the plaintiff, (2) the plaintiff relied on that promise, (3) the plaintiff's reliance was expected and foreseeable by the defendant, and (4) the plaintiff relied on the promise to his or her detriment. *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). The element of detrimental reliance typically involves the expenditure of money or other liabilities

incurred in reliance upon the defendant's promise. *Bredemann v. Vaughan Mfg. Co.*, 40 Ill. App. 2d 232, 245 (1963). In those cases, it is " 'the expending of money or the incurring of legal liabilities operating by way of estoppel[] that gives the right of the action and without which there is no cause of action.' " *Id.* (quoting *Estate of Switzer v. Gertenbach*, 122 Ill. App. 2d 26, 29 (1965)). Detrimental reliance can also be shown by a definite and substantial change in the plaintiff's position that would not have occurred if the promise had not been made. See *Hux v. Woodcock*, 130 Ill. App. 3d 721, 724 (1985).

¶ 22 In the case at bar, the plaintiff pleaded only conclusions regarding her detrimental reliance, presented no evidence of detrimental reliance, and did not assert in discovery that she had detrimentally relied on her mother's promise. There are no pleadings filed or any evidence submitted to show any money expended, any legal liability incurred, or any change in the plaintiff's position as a result of relying on her mother's alleged promise. The only allegation of detrimental reliance came in June 2001 when the plaintiff alleged that she could have had \$300,000 on April 19, 1997, or shortly thereafter, but that she chose to wait and only then found out that she was being denied the money. That is not a factual allegation of detrimental reliance but only a circular statement that she did not get the money after waiting. Therefore, the trial court properly granted the defendant's motion for a summary judgment because there is no genuine issue of fact regarding detrimental reliance.

¶ 23 The plaintiff argues that she was denied due process because the trial court granted the defendant's motion for a summary judgment without first affording her an opportunity to be heard. The Code of Civil Procedure provides that a defendant may move for a summary judgment in his favor "at any time" and that "[t]he opposite party may prior to or at the time of the hearing on the motion file counteraffidavits." 735

ILCS 5/2-1005(b), (c) (West 2010). The plaintiff did not assert this issue in the trial court by way of a motion to reconsider or some other post-summary judgment motion. In her opening brief, the plaintiff did not allege any new or additional facts she would have brought to the attention of the trial court if a hearing had been conducted. Even in her reply brief, she alleges only that the trial court "would have been obligated to consider the Affidavit or Affidavits that might have then been filed." She goes on to describe at length the content of the affidavits she would have filed if given the opportunity, but she does not assert that she would have presented any facts to show any detrimental reliance on her mother's alleged promise.

¶ 24 The defendant argues that the trial court was not required to conduct a hearing because the record was sufficient to show that there was no genuine issue of material fact and that the defendant was entitled to a judgment as a matter of law. Additionally, the defendant contends that the plaintiff was not prejudiced because she had been given ample opportunity to make her arguments at previous hearings and through numerous filings in support of her own motion for a summary judgment, which involved the same issues as the defendant raised in his motion for a summary judgment. We agree with the defendant. Although the summary judgment statute provides for a hearing, it does not define the term "hearing" and does not require the reversal of a summary judgment entered without a hearing. See *Lawless v. Central Production Credit Ass'n*, 228 Ill. App. 3d 500, 515 (1992) (the trial court's grant of a summary judgment without a hearing was affirmed upon a finding that the term "hearing" as used in the summary judgment statute "is not necessarily restricted to an oral presentation by the parties and may instead refer to the court's consideration of a written presentation by the parties").

¶ 25 The only case the plaintiff cites in support of this argument does not change

our position. In *Acosta v. Sharlin*, 295 Ill. App. 3d 102, 103-04 (1998), the appellate court found that the trial court had improperly conducted a hearing on the defendant's motion for a summary judgment without adequate notice to the plaintiff, who did not appear at the hearing. However, in *Acosta*, the plaintiff filed a motion in the trial court requesting that the summary judgment be vacated, he argued that he had an expert witness who would have supported his objection to the summary judgment, he filed an affidavit in support of his post-summary judgment motion to vacate, and he attached copies of discovery responses in support of his position. *Id.* at 104.

¶ 26 By contrast, in the case at bar, the plaintiff did not address this issue in the trial court before filing her notice of appeal. Moreover, she has not presented a single fact or indicated *any* evidence that she could submit to show that she detrimentally relied on her mother's alleged promise. In more than a decade of litigation, the plaintiff has failed completely to present any evidence or state a single factual allegation to show detrimental reliance. She was not denied due process by the trial court's entry of a summary judgment in favor of the defendant based upon the documents submitted prior to that date and without an additional hearing for the purpose of receiving oral arguments.

¶ 27 The plaintiff also argues that the trial court erred in granting a summary judgment to the defendant because Watkins, the substituted party, lacked standing to raise the issue of the Dead-Man's Act. This argument is apparently in response to the defendant's argument in his motion for a summary judgment that the constraints of the Dead-Man's Act prevented the plaintiff from presenting any admissible evidence in support of her allegations concerning her mother's promise. However, our ruling is not based upon the plaintiff's allegation about her mother's promise. Our ruling is based *only* on the defendant's allegation in his motion for a summary judgment that

the plaintiff failed to submit evidence on the element of detrimental reliance. We may affirm the trial court's grant of a summary judgment on any basis apparent of record. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). The Dead-Man's Act has no bearing on our ruling that the plaintiff has utterly failed in more than a decade of litigation to present any evidence to show detrimental reliance, an essential element of her cause of action. Since the provisions of the Dead-Man's Act are not relevant to our ruling, whether Watkins had standing to raise it as a defense is not relevant, and we have no reason to address it.

¶ 28 Finally, we have considered the defendant's motions that we took with this case, together with the plaintiff's responses thereto. In the defendant's motion to strike, the defendant references five exhibits and certain references to conversations with Mrs. Beil. None of the exhibits or conversations form any part of our ruling herein. Accordingly, we deny the motion to strike. We also deny the defendant's motion for leave to file a reply in support of the motion to strike.

¶ 29 CONCLUSION

¶ 30 For all the reasons stated, we affirm the trial court's order granting the defendant's motion for a summary judgment.

¶ 31 Motions denied; judgment affirmed.