2012 IL App (1st) 111965-U

FIFTH DIVISION
July 20, 2012

No. 1-11-1965

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

MARY A. TUJETSCH,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	No. 06 CH 11607
	)	
TODD C. PUSATERI, FIRST DENTAL, P.C., and FIRST DENTAL OF ORLAND PARK, P.C.,	)	Honorable
	)	Raymond W. Mitchell,
	)	Judge Presiding.
Defendants-Appellees.	)	

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly granted summary in favor of defendants on plaintiff's amended complaint for breach of contract and fraud in connection with sale of dental practice where contract language was unambiguous and plaintiff failed to present any evidence that defendants misrepresented the number of "active patients" or that equipment was not in working order.

¶ 2 In 2004, plaintiff Mary A. Tujetsch, a dentist licensed in Illinois, purchased a dental practice located in Orland Park from First Dental, P.C. Plaintiff signed an asset purchase

agreement (the Agreement) on June 27, 2004 with defendant Todd C. Pusateri, a dentist licensed in Illinois and president of First Dental, P.C. On June 28, 2004, as required by the Agreement, plaintiff also entered into a five-year lease agreement for the office space in Orland Park. The lease agreement was signed by plaintiff and Todd C. Pusateri, as president of First Dental of Orland Park, P.C. Plaintiff subsequently filed suit against Todd C. Pusateri (defendant), First Dental, P.C, and First Dental of Orland Park, P.C. (collectively, defendants), alleging fraud and breach of contract. Plaintiff appeals from the order of the circuit court of Cook County denying her motion for summary judgment and granting defendants' motions for summary judgment as to (1) all counts of plaintiff's amended complaint alleging breach of contract and fraud and (2) the meaning of the contractual term "active patients." We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant established his Orland Park dental practice (the Dental Practice) in March 1998. On March 31, 2001, defendant entered into a sales and service contract with a specialized third-party service provider, First Pacific Corporation (FPC), for the purpose of outsourcing management of accounts receivable including the issuance and collection of patient bills. As part of the sales and service contract, FPC, placed a computer terminal in the Dental Practice's office into which information about patients and patient treatment was entered and stored, such as contact and billing information, and date and type of treatments rendered. The computer terminal and software remained the exclusive property of FPC.

¶ 5 In early 2004, defendant listed the Dental Practice for sale. Plaintiff expressed an interest in purchasing it. On April 18, 2004, plaintiff executed a confidentiality agreement regarding

information provided to her by First Dental. Plaintiff agreed to preserve the confidentiality of, among other things, "[a]ny financial data ... which may include such items as value of practice under consideration, income statements or balance sheets, Internal Revenue Service returns, and any other personal financial data" and "[p]atient or client lists made known to [her] during negotiations." As of April 18, 2004, information about all patients treated in the Dental Practice, since it opened in March 1998, was recorded in patient charts stored on shelves in the office of the Dental Practice, as required by law. Information about all patients of the Dental Practice and detailed information about all patient treatments rendered after March 30, 2001, was also accessible from the FPC computer terminal in the office of the Dental Practice. After she signed the confidentiality agreement, plaintiff was given access to the Dental Practice's books and records, including all patient charts and the FPC computer terminal.

¶ 6 The FPC computer terminal, in addition to serving as a conduit for third party billing, provided electronic access to patient lists, fee statements, and reports and could be queried to generate lists of all patients, or subsets of patients, treated in the Dental Practice. One of these reports was called a "Practice Overview" that included a count of "active patients" as of a given date. FPC software states that the number of "active patients" for any given date is the number of patients treated during the previous 24 months.

¶ 7 On April 29, 2004, defendant used the FPC computer terminal to generate two Practice Overview reports. One report was for the date of December 30, 2003; the other report was for the date of April 29, 2004. According to the reports, the number of active patients was 1,223 as of December 30, 2003, and 1,227 as of April 29, 2004.

¶ 8 In a letter to defendant, dated May 1, 2004, plaintiff stated that she had "spent a considerable amount of time with [her] financial advisers and dental expert" and was prepared to make an offer of $150,000 to purchase the Dental Practice. After additional negotiations, the parties came to an agreement and defendant accepted a $165,000 cash offer to purchase the practice.

¶ 9 On June 27, 2004, defendant and plaintiff met at the Dental Practice's office to execute an asset purchase agreement and a lease. The first paragraph of the unexecuted asset purchase agreement, which contained the only reference to active patients, stated:

> "Seller is the owner of the dental practice located [in Orland Park] (hereinafter, the Dental Practice). Seller desires to sell, and Purchaser desires to purchase, substantially all of the assets associated with the Dental Practice on the terms and conditions set forth in this Agreement, but none of its liabilities unless specifically assumed, and none of its shares of stock. Seller has represented that the Dental Practice has _____ active patients, who have been treated within the previous twelve months."

This underscored space before the phrase "active patients" was originally blank when the parties met. At that time, in plaintiff's presence, defendant consulted the FPC terminal to confirm that the number of active patients remained at approximately 1,200 as previously contained in the two Practice Overview reports. After defendant confirmed the number, he modified the last sentence of the first paragraph as follows:

> Seller has represented that the Dental Practice has *approx.* 1200 active patients,

who have been treated within the previous ~~twelve months~~ *twenty four months according to First Pacific Corporation Software*."

The phrases "approx. 1200" and "twenty four months according to First Pacific Corporation Software" were added by defendant in handwriting. The modified provision was then initialed by both plaintiff and defendant. Thus, the representation in the Agreement regarding the number of active patients was partially typewritten and partially handwritten.

¶ 10 The Agreement also expressly excluded certain assets including "any property of First Pacific Corporation, including its computers, monitors, keyboards, battery backup, computer speakers, laser printer, color printer, computer software, and computer connections." The Agreement also contained a provision entitled "Access to Properties, Books and Records" which, in pertinent part, stated: "Prior to the Closing Date, Seller, shall, at Purchaser's request, afford or cause to be afforded to the agents, attorneys, accountants and other authorized representatives of Purchaser reasonable access during normal business hours to all employees, properties, books and records of the Dental Practice and shall permit such persons, at Purchaser's expense, to make copies of such books and records."

¶ 11 The Agreement provided that the Closing would take place on July 1, 2004, but that plaintiff would take possession on June 30, 2004. In fact, after plaintiff and defendant executed the Agreement at the office on June 27, 2004, plaintiff gave defendant a check for the balance of the $165,000 purchase price and received keys and unrestricted access to the Dental Practice.

¶ 12 In order to retain access to the FPC terminal and software, plaintiff entered into a sales and service agreement with FPC on June 30, 2004. Plaintiff negotiated with FPC for continued

access to FPC billing services and an FPC computer terminal.

¶ 13 Nine months after the sale, defendant received a letter from plaintiff dated April 5, 2005. In her letter, plaintiff stated that her "absentee ownership" of the Dental Practice had been a "recipe for disaster" and she was considering selling the practice. She stated her belief that her chances of selling the practice would be greatly enhanced if she could offer the sale of the building in addition to her practice. She asked defendant if he was open to selling the building to her. The letter made no mention of the number of active patients or the condition of the equipment. On April 6, 2005, plaintiff sent a second letter to defendant. She offered defendant $1 million for the building and stated that the offer would expire at 5:00 p.m. that day. Defendant did not accept the offer.

¶ 14 Six months later, in a letter to defendant, dated October 24, 2005, plaintiff claimed, for the first time, that the Agreement executed on June 27, 2004 had overstated the number of active patients. The letter made no mention of the condition of the equipment. In response, defendant denied that he had misstated the number of active patients and produced copies of the two Practice Overview reports that he had generated from the FPC terminal in 2004.

¶ 15 Plaintiff's brief does not contain a detailed procedural history regarding the instant case. Although defendants state that plaintiff initiated this civil action sometime after October 31, 2007 (the date plaintiff notified defendants she was terminating the lease and vacating the office space), the record seems to indicate otherwise. According to the record, and the Cook County clerk's website, the original complaint in the underlying case (06 CH 11607) was filed in the chancery division on June 12, 2006 and the case was transferred from the chancery division to

the law division of the circuit court in 2007.

¶ 16 On June 12, 2006, plaintiff filed a five-count complaint against defendants. Count I alleged fraud and sought rescission of the Agreement and the lease; Count II alleged rescission based on mutual mistake of fact; Count III alleged breach of contract; Count IV alleged fraud against Pusateri; and Count V sought a declaratory judgment that the lease was void *ab initio*. In the complaint, plaintiff complained for the first time, that equipment delivered into her possession on June 27, 2004 and June 30, 2004 was not in working order. Plaintiff subsequently amended her complaint. The three count amended complaint against defendants alleged breach of contract (Counts I and II) and fraud in the inducement (Count III). Plaintiff alleged, among other things, that defendant had misrepresented the number of "active patients" of the Dental Practice, and misrepresented the condition of the equipment.

¶ 17 In early 2011, the parties filed cross motions for summary judgment. Defendants filed two motions: one as to all counts of the amended complaint, and another as to the meaning of "active patients." Plaintiff filed a motion as to Count II of her amended complaint.

¶ 18 On June 10, 2011, the trial court granted summary judgment in favor of defendants on all counts of plaintiff's amended complaint. The trial court also granted summary judgment in favor of defendants on the meaning of "active patients." The trial court denied plaintiff's motion for summary judgment on count II of her amended complaint. Plaintiff filed this timely appeal on July 11, 2011.

¶ 19 ANALYSIS

¶ 20 We review the trial court's decision to grant summary judgment *de novo*. *Outboard*

Marine Corp. v. Liberty Mutual Insurance Co., 154 Ill. 2d 90, 102 (1992). Summary judgment aids in the expeditious disposition of a lawsuit. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32 (2004). However, " '[s]ummary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt.' " *Village of Palatine v. Palatine Associates, LLC,* 2012 IL App (1st) 102707, ¶ 42 (quoting *Outboard Marine Corp.*, 154 Ill. 2d at 102). "Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file reveal that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Thompson v. Gordon*, 241 Ill. 2d 428, 438 (2011). We construe all evidence strictly against the moving party and liberally in favor of the nonmoving party. *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308 (2008).

¶ 21 A party moving for summary judgment may meet its initial burden of proof by affirmatively showing that some element of the case must be resolved in its favor or by establishing that there is an absence of evidence to support the nonmoving party's case. *Village of Palatine*, at ¶ 42. If a plaintiff cannot establish each element of its cause of action, summary judgment for the defendant is proper. *Newsom-Bogan v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 2011 IL App (1st) 092860, ¶ 13. Although a plaintiff need not prove its case at the summary judgment stage, it must present some evidentiary facts to support the elements of its cause of action. *Id.* at ¶ 21. We may affirm summary judgment on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct. *Northern Illinois Emergency Physicians v. Landau, Omahana & Kopka, Ltd.*, 216 Ill. 2d 294, 305 (2005).

¶ 22 "Contract construction and interpretation are generally well suited to disposition by

summary judgment." *William Blair and Co., LLC v. FI Liquidation Corp.,* 358 Ill. App.3d 324, 334 (2005). The principles that apply to our resolution of the issue presented in this appeal are well-settled:

> "[T]he objective in interpreting a contract is to ascertain and give effect to the intent of the parties. [Citation.] Though the term "intent" is frequently used in this context, subjective intentions are irrelevant; rather, the pertinent inquiry focuses upon the objective manifestations of the parties, including the language they used in the contract. [Citation.] Thus, it is commonly stated that undisclosed intentions are not relevant. [Citation.] Where the language of a contract is plain, it provides the best evidence of the parties, intent and will be enforced as written. [Citation.] However, if a term of an agreement is susceptible to more than one reasonable interpretation, it is ambiguous. [Citation.] Mere disagreement between the parties does not make a term ambiguous [citation], which follows naturally from the principle that the subjective intentions of the parties are not relevant. To find an ambiguity, then, it is necessary that two objectively reasonable interpretations exist." *Carey v. Richards Building Supply Co.*, 367 Ill. App. 3d 724, 727 (2006).

If a contract contains an ambiguity requiring the admission of extrinsic evidence to ascertain its meaning, a genuine issue of material fact exists, precluding summary judgment. *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272 (1992); accord *William Blair and Co., LLC v. FI Liquidation Corp.*, 358 Ill. App. 3d at 334.

¶ 23 *Count I of Plaintiff's Amended Complaint* (*Breach of Contract*)

¶ 24 Count I of plaintiff's amended complaint alleged that defendants breached the Agreement because First Dental, P.C. never provided plaintiff with patient lists as required by the Agreement. Defendants argued that there was no evidence that plaintiff failed to receive access to, or the right to copy, patient lists for the Dental Practice. Plaintiff failed to address defendants' argument in her response to their motion for summary judgment, and plaintiff's counsel did not oppose the same argument during oral argument. The trial court determined that defendants were entitled to summary judgment as a matter of law. Plaintiff has not raised this issue on appeal.

¶ 25 *Count II of Plaintiff's Amended Complaint* (*Breach of Contract*)

¶ 26 Plaintiff contends that she was entitled to summary judgment on Count II of her amended complaint and defendants' motion for summary judgment should have been denied. In Count II, plaintiff alleged that defendant made misrepresentations as to the equipment's condition and the number of active patients. In an affidavit, plaintiff stated she had understood the term "active patients" to mean patients who had maintained "a continual, ongoing relationship where treatment is obtained on a fee basis" and who had not "changed dentists, moved, refused to schedule appointments, had billing disputes, demanded discounts, [been] referred to collections, or [died.]"

¶ 27 As she did before the trial court, plaintiff argues that defendant misrepresented the number of "active patients" because the number 1200 included those patients who, although seen in the past 24 months, were not "active" patients because they had not scheduled additional appointments, were deceased, had moved away, or had changed dentists. She argues that the

evidence showed that Dr. Pusateri's staff had knowledge of whether certain patients were no longer active based upon their refusal to schedule a follow-up appointment after three attempts (for which their physical file would be marked “NFA” for “no future appointments”) or because they had changed dentists (for which their physical file would be marked “CD”). Plaintiff has conceded, however, that there was no evidence presented that such patients would be removed from the First Pacific Corporation software database. She further asserts that the definition of “active patients” used by First Pacific Corporation is irrelevant because she understood the reference as indicating only where the identities of the active patients could be found. Plaintiff claims that “the term 'active patients' is unambiguous and refers to *current* patients or patients with an ongoing or continuing relationship with the Dental Practice.”

¶ 28 a. Plain Meaning of “Active Patients”

¶ 29 Our resolution of this issue involves the interpretation and construction of the phrase “active patients.” “Unless a contract clearly specifies its own meanings, a court must interpret the words of the contract with their common and generally accepted meanings.” *Id.* Here, apart from the disputed phrase in question, the contract does not otherwise define “active patients.” The trial court agreed with defendants that the dependent clause “who have been treated within the previous twenty four months according to First Pacific Corporation Software” defined “active patients.” Plaintiff now argues that “the dependant clause is adjectival, it modifies the term 'active patients,' but does not define it.”

¶ 30 Plaintiff's interpretation of the term “active patients” relies upon her alleged subjective understanding of the term, as stated in her affidavit, as meaning patients with “a continual,

ongoing relationship where treatment is obtained on a fee basis" and who have not "changed dentists, moved, refused to schedule appointments, refused treatment, ... lost insurance, had billing disputes or [died]." This additional language appears nowhere in the Agreement. As defendants note, this would have required a "laborious file-by-file review." Plaintiff claims it would have only required defendants to update their database with the information contained in the patient files.

¶ 31 Irrespective of plaintiff's "subjective" understanding of the term "active patients," we must decide whether, in the instant case, two objectively reasonable interpretations of the term exist. *Carey*, 367 Ill. App. 3d at 727. Plaintiff's interpretation, which differentiates the term "active patients" from the rest of the phrase, "who have been treated within the previous twenty four months according to First Pacific Corporation Software" implicitly means that the pool of "active patients" consisted also of patients who had *not* been treated within the previous twenty four months according to First Pacific Corporation Software." Thus, according to plaintiff's "subjective" interpretation of the phrase, that "active patients" meant something different than the referenced patients "who have been treated within the previous twenty four months according to First Pacific Corporation Software," there also existed "active patients" who had *not* been treated within the past, but who may have been treated within "twenty five months" or twenty six months" – or even longer – but *this* set of active patients was not being sold as part of the assets, and was apparently being ignored by defendant. This interpretation is not a reasonable interpretation. Obviously, patients who were "not" treated within the previous twenty four months according to First Pacific Corporation Software were the "inactive" patients. Clearly, the

Agreement distinguishes the "inactive" and "active" patients by describing the active patients as those who were "treated within the previous twenty four months according to First Pacific Corporation Software."

¶ 32 As defendants correctly note, if one substitutes plaintiff's definition of "active patients" for the phrase "active patients" contained in the Agreement, it reads as follows:

> "Seller has represented the Dental Practice has approx. 1200 *patients who maintain a continual, ongoing relationship where treatment is obtained on a fee basis, and have not changed dentists, moved, refused to schedule appointments, refused treatment, lost insurance, had billing disputes or died,* who have been treated within the previous twenty four months according to First Pacific Software."

Again, according to plaintiff's "subjective" interpretation of active patients as being distinct from patients "treated within the previous twenty four months according to First Pacific Corporation Software," there would be "active" patients who were not necessarily seen within the past twenty four months but who nonetheless maintained "a continual, ongoing relationship" with the practice. This interpretation is also unreasonable. We conclude that, under the plain and ordinary meaning of the language in the Agreement, "active patients" were those who had "been treated within the previous twenty four months according to First Pacific Corporation Software."

¶ 33 b. "Active Patients" as a Term of Art

¶ 34 Although we conclude that there was no ambiguity in the Agreement, defendants argue that the definition of "active patients" in the dependent clause is consistent with the definition of

"active patients" as a professional term of art in the dental profession. The trial court found this argument persuasive.

¶ 35 In *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 301 (2003), our supreme court stated that a term of art is defined as a word's "specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." *Vicencio*, 204 Ill. 2d 295, 301 (2003) (quoting Black's Law Dictionary 1483 (7th ed. 1999). "In ascertaining the intent of the parties, the court examines the relevant circumstances surrounding the execution of the agreement, the conduct of the parties, the custom and usage of the business interest and the language and terms of the agreement itself." *Millennium Park Joint Venture, LLC v. Houlihan*, 393 Ill. App. 3d 13, 26 (2009). Thus, courts interpret contract terms "in accordance with the custom and usage of those particular terms in the trade or industry of the parties." *Intersport, Inc. v. National Collegiate Athletic Ass'n*, 381 Ill. App. 3d 312, 319 (2008); see also *Amalgamated Transit Worker's Union v. Pace Suburban Bus*, 407 Ill. App. 3d 55, 58-59 (2011) ("Engrafted on every written contract are the customs, practices and definitions which are commonly understood and accepted by the parties."); *Intersport, Inc. v. National Collegiate Athletic Ass'n*, 381 Ill. App. 3d 312, 319 (2008) ("Contract terms should also be interpreted in accordance with the custom and usage of those particular terms in the trade or industry of the parties). As our supreme court has explained:

> "Proof of custom or usage is intended as an aid to the interpretation of the intent of the parties at the time the contract was made. If a usage exists in a particular trade of which both parties either had notice or should have had notice, it is only

> just and proper that their contract should be interpreted in view of the trade practice." *Chicago Bridge & Iron Co. v. Reliance Insurance Co.*, 46 Ill. 2d 522, 531-32 (1970).

See also *Village of Glenview v. Northfield Woods Water & Utility Co., Inc.*, 216 Ill. App. 3d 40, 50 (1991) ("Under certain circumstances, testimony may be admissible to explain the meaning of a word which has a special meaning within a business or trade.").

¶ 36 Plaintiff contends, however, that the trial court should have limited its analysis to the plain and ordinary meaning of the words "active patients" because that the term is unambiguous. We have already determined the plain and ordinary meaning of the term and determined that plaintiff's interpretation was not reasonable. Nonetheless, contrary to plaintiff's assertion, "contract terms need not be found to be ambiguous before evidence of the custom and usage of the terms in the parties' trade or practice can be considered." *Intersport, Inc.*, 381 Ill. App. 3d at 320 (citing *Merchants Environmental Industries, Inc. v. SLT Realty Ltd. Partnership*, 314 Ill. App. 3d 848, 863 (2000)). In *Merchants Environmental Industries*, the court explained:

> "[A]ccording to the Restatement (Second) of Contracts, [t]here is no requirement that an agreement be ambiguous before evidence of a usage of trade [or course of dealing] can be shown, nor is it required that the usage of trade [or course of dealing] be consistent with the meaning the agreement would have apart from the usage [or course of dealing]." (Internal quotation marks omitted.) *Id*. at 863-64 (quoting Restatement (Second) of Contracts § 222 cmt. b, § 223 cmt. b (1981) and citing 5 W. Jaeger, Williston on Contracts § 648, at 6-7 (3d ed. 1961) ("Usage is

> an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense" (emphasis omitted)).

¶ 37 We find instructive the Seventh Circuit case of *Matter of Envirodyne Industries, Inc.*, in which the court explained:

> The object in excluding [extrinsic] evidence is to prevent parties from trying to slip out of their clearly stated, explicitly assumed contractual obligations through self-serving testimony or documents-which, though self-serving, might impress a jury-purporting to show that the parties didn't mean what they said in the written contract. Contractual obligations would be too uncertain if such evidence were allowed. But dictionaries, treatises, articles, and other published materials created by strangers to the dispute, like evidence of trade usage, which is also admissible because it is also evidence created by strangers rather than by a party trying to slip out of a contractual bind, do not present a similar danger of manufactured doubts and are therefore entirely appropriate for use in contract cases as interpretive aids. Appropriate, and sometimes indispensable. It would be passing odd to forbid people to look up words in dictionaries, or to consult explanatory commentaries that, like trade usage, are in the nature of specialized dictionaries. *Matter of Envirodyne Industries, Inc.*, 29 F.3d 301, 305 (7th Cir. 1994).

As the Seventh Circuit has observed "[t]he difference between evidence of trade usage and

testimony by a party to the idiosyncratic meanings that he and his opponent attached (he says) to the words they used when they were negotiating the contract is that evidence of trade usage is objectively verifiable. It is evidence about what words, phrases, etc. mean to a community, not merely to a pair of individuals; it is evidence about a public, not a private, language-evidence that is the equivalent, really, of a specialized dictionary." *Bristow v. Drake Street Inc.*, 41 F.3d 345, 352 (7th Cir.1994).

¶ 38 Defendants contend that the applicable meaning of "active patients" is the definition provided by the American Dental Association (ADA). According to the ADA, an active patient is either: a patient of record who has had dental services provided by the dentist in the past twelve months, or a patient of record who has had dental services provided by the dentist in the past twenty four months, but not within the past twelve months. This term of art is used to provide a rough indication of the size of a dental practice based on past experience. Thus, it is based on historical fact, not speculation. The only variation in the generally accepted definition of "active patient" is the number of months in the look back period. The trial court noted the commonality between the definitions provided in the Agreement and that of the ADA definition. Thus, the court determined that "active patients" meant those patients who had been "treated within the previous twenty four months without any consideration of other factors such as, death or change of residence." We agree that this was the proper interpretation.

¶ 39 Plaintiff also argues that summary judgment should not have been granted because a genuine issue of material fact existed regarding the condition of the equipment at the time she purchased the Dental Practice. The Agreement expressly provides: "Seller represents that all

equipment is working and in good order." In her amended complaint, plaintiff alleged that the dental equipment was not in good order as represented. In her affidavit, she stated: "The following dental equipment was not working and in good order: dental chair, cuspidor and light, x-ray developer, autoclave, ultasonic [*sic*] cleaner, copier/fax, phone system and stereo system with speakers." She also attested: "Because the equipment was not working and in good order, I had to do the following: (1) replace one of the dental chairs, (2) replace the x-ray developer, (3) replace the autoclave, (4) replace the ultrasonic cleaner, (5) replace the copier/fax, and (6) replace the stereo system."

¶ 40 As defendants note, plaintiff has not presented any evidence (nor even asserted) that the listed equipment was not working and in good order on or around June 27, 2004, the date defendant sold her the Dental Practice. As the trial court noted, in her several correspondences with defendant in the year following the purchase of the Dental Practice, plaintiff never mentioned any problems regarding equipment. Defendants, however, provided affidavits of the office staff that provided evidence that the equipment was working at the relevant time - when the practice was purchased on June 27, 2004. Tina Buben-Dowling, a dental assistant employed with the Dental Practice from 1999 to 2005, stated that her duties required her to regularly monitor and use the equipment and that, if equipment malfunctioned, it was her "responsibility to investigate the problem and, subject to approval, arrange for a replacement or repair." She further attested that "all of the equipment in the Dental Practice was in working order when I left the office before Sunday, June 27, 2004, and remained in working order thereafter, on June 30, 2004." In addition, Jackie Galban, a dental hygienist employed at the Dental Practice from 2002

until September 2004, testified similarly in her affidavit and further attested that "no equipment owned by the Dental Practice was out of order on or around June 27, 2004 or June 30, 2004, the date Tujetsch officially assumed exclusive possession and control of the Dental Practice." Thus, there was no genuine issue of material fact as to whether any of the equipment was in good and working order at the time plaintiff purchased the Dental Practice.

¶ 41 In sum, no genuine issues of material fact exist regarding the number of active patients or the condition of the equipment. We conclude that the trial court correctly granted summary judgment on Count II of plaintiff's amended complaint in favor of defendants, and correctly denied plaintiff's amended motion for summary judgment on Count II of the amended complaint. The trial court also correctly granted defendants' motion for summary judgment as to the meaning of the term "active patients" for the reasons stated above.

¶ 42 *Count III of Plaintiff's Amended Complaint* (*Fraud in the Inducement*)

¶ 43 In her brief, plaintiff contends that genuine issues of material fact preclude summary judgment on Count III of the amended complaint. Count III, which alleged fraud in the inducement, was based upon the same contentions that defendants misrepresented the number of active patients and the true condition of the dental equipment. Plaintiff now argues that "the trial court's order did not address the *allegation* that Dr. Pusateri misrepresented that he charged the usual and customary fees as Dr. Tujetsch stated in her affidavit." In her affidavit, which she presented in support of her motion for summary judgment as to her *breach of contract* count, defendant attested to several representations made by plaintiff, including the representation that "[t]he Dental Practice charged usual and customary fees to patients." There is no allegation

regarding this statement in plaintiff's amended complaint. Moreover, the affidavit was in support of her amended motion for summary judgment based upon the definition of “active patients” and her contention that it meant patients who had “a continual, ongoing relationship where treatment is obtained on a fee basis.” We have already concluded that the Agreement defined active patients as those “who have been treated within the previous twenty four months according to First Pacific Corporation Software.” There is no genuine issue of material fact as to Count III and the trial court correctly granted summary judgment in favor of defendants.

¶ 44 CONCLUSION

¶ 45 In view of the foregoing, we affirm the judgment of the circuit court of Cook County entered on June 10, 2011, granting defendants' motion for summary judgment as to the meaning of “active patient"; granting defendants' motion for summary judgment on Counts I, II, and III of the amended complaint; and denying plaintiff's amended motion for summary judgment on Count II of the amended complaint.

¶ 46 Affirmed.