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SECOND DIVISION
July 31, 2012

No. 1-11-2969
2012 IL App (1st) 112969-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL NOTTINGHAM,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County
	)	
v.	)	2008 L 10387
	)	
BIGGERS MOTORS, INC.,	)	Honorable
	)	James E. Snyder,
Defendant-Appellee.	)	Judge Presiding.
	)	
(Mazda Motors of America, Inc.,	)	
	)	
Defendant.)	)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn concurred in the judgment.
Justice Harris dissented.

ORDER

Held: Summary judgment for defendant was proper where the undisputed facts in the record established that plaintiff could not prove necessary elements for breach of contract, promissory estoppel, and statutory fraud claims.

¶1 Plaintiff Daniel Nottingham sued defendants Biggers Motors, Inc., and Mazda Motors of America, Inc., for breach of contract, promissory estoppel, and fraud under section 2P of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2P (West 2010)). Plaintiff alleged that he won a Mazda MX-5 Miata convertible as part of sweepstakes contest, but defendants refused to deliver the vehicle. Plaintiff appeals from summary judgment in favor of

defendant Biggers on all counts. (Mazda lost on two of the three counts at summary judgment and is not part of this appeal.) We affirm.

¶2 There is no real dispute about the material facts of this case. In early 2007, plaintiff filled out an online entry form on Mazda's website for a contest called the Mazda 2007 Midwest Auto Show Match & Win Sweepstakes. The contest was simple. After entering the contest, entrants received a "game piece" via email that contained a series of three, three-digit numbers, which they then had to take to a local Mazda dealership that was participating in the sweepstakes. At the dealership, a corresponding series of numbers were posted on cards in and around a 2007 Mazda MX-5 Miata that was on display. Entrants would then examine the vehicle to determine whether the numbers on the vehicle matched the numbers on their game piece. If all three sets of numbers matched, then entrants would win the car.

¶3 After entering the contest, plaintiff took his game piece to defendant, which was a local participating dealership. There he met two of defendant's representatives, William Larkey and Ron Liska. Plaintiff presented his game piece to Larkey and the two of them inspected the MX-5 on display in the showroom. The numbers were located on cards placed on the windshield, on or above the dashboard, and in the trunk. After checking the numbers, plaintiff and Larkey realized that plaintiff's game piece matched all three numbers on the vehicle. Plaintiff testified at his deposition that Larkey reviewed the numbers and confirmed that they matched and then told plaintiff that he had won the contest. Larkey informed Liska, who also confirmed the numbers and told plaintiff that he had won. Liska mentioned to plaintiff that there "would be a big presentation ceremony to award the prize once everything was verified," and both Larkey and Liska told plaintiff "that 'as a formality' the email printout with the number had to be mailed to an address in Pennsylvania by certified mail." Plaintiff stated that he "was assured this was a

'mere formality' and that [he] had won the car." Liska and Larkey gave plaintiff copies of the contest rules and explained what he needed to do next to claim the prize, although plaintiff testified that he previously read the rules for himself when he entered the contest. After he went home, plaintiff reviewed the rules again and realized that a representative from the dealership needed to sign his game piece before he sent it in. Plaintiff returned to the dealership about an hour and a half after departing so that Liska could sign the game piece. A few days later, plaintiff mailed the signed game piece and some other information to the address designated in the contest rules.

¶4 About two weeks later, plaintiff received a phone call from Loretta Mongillo, the operations manager for a company called Family Guide, Inc., which is a third party that administered the contest on behalf of Mazda. Mongillo informed plaintiff that he had not, in fact, won the contest because the third set of numbers on his game piece "did not match the winning numbers." (Though not relevant to the issues currently on appeal, it appears from the record that what had happened was that there was a mix-up regarding the third set of numbers that were in the trunk of the display model. Plaintiff stated at his deposition that after his conversation with Mongillo he returned to the dealership, where Liska informed him that apparently someone had placed a card from a previous contest in the trunk instead of one for the current contest. This is why plaintiff, Liska, and Larkey all believed that plaintiff had won the contest. Plaintiff's numbers did in fact match the ones posted on the car, but those numbers were not the "official" numbers that the contest administrators expected to be there.)

¶5 Defendant and Mazda contended that plaintiff had not actually matched the winning numbers and refused to deliver the MX-5 to plaintiff, which led to this lawsuit. The complaint at issue here is plaintiff's second amended complaint, which raises claims of breach of contract,

promissory estoppel, and statutory fraud under section 2P of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2P (West 2010)). Defendant and Mazda both moved for summary judgment, largely on a variety of affirmative contractual defenses. The circuit court granted summary judgment to defendant on all counts but allowed plaintiff's breach of contract and fraud claims to continue against Mazda. Plaintiff appealed the ruling in favor of defendant under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶6 We review *de novo* whether summary judgment is appropriate. See *Forest Preserve Dist. v. First National Bank*, 2011 IL 110759, ¶ 62. "Summary judgment is proper when the pleadings, depositions and affidavits on file demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id.*; accord 735 ILCS 5/2-1005(c) (West 2012).

¶7 Plaintiff argues throughout his brief that there are issues of material fact that preclude summary judgment in this case, but all of the disputes that plaintiff claims exist are actually issues of law, not fact. Indeed, the most important items that defendant submitted in support of its motion for summary judgment were plaintiff's own affidavit and deposition testimony, and plaintiff never submitted any counter-affidavits or other evidence in opposition. The facts are not in dispute, so the only question is whether defendant is entitled to judgment as a matter of law. Defendant argues on appeal that summary judgment was proper because plaintiff cannot prove essential elements of his causes of action. See *Colburn v. Mario Tricoci Hair Salons & Day Spas, Inc.*, 2012 IL App (2d) 110624, ¶ 33.

¶8 Initially, we note that although the circuit court granted summary judgment to defendant on all three counts, it is hard to tell whether plaintiff is challenging the judgment on the breach of contract count. In his brief, plaintiff's statement of the issues presented for review (see Ill. S. Ct.

R. 341(h)(3) (eff. July 1, 2008)) lists only count III (fraud) and count II (promissory estoppel) as issues on appeal. Plaintiff does refer to a breach of contract in his argument, but this is not developed and is lumped together with arguments about promissory estoppel in a section of the brief ostensibly devoted to analyzing the circuit court's decision on the promissory estoppel claim. Although we are inclined to deem this argument forfeit for failure to properly raise it (see Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008)), the breach of contract claim is sufficiently interrelated with the promissory estoppel issue that we will address the two together.

¶9 The general thrust of plaintiff's claims on the breach of contract and promissory estoppel counts is that Mazda and defendant (as Mazda's agent) made an enforceable promise that if plaintiff entered the contest and performed all of the conditions listed in the contest rules, chiefly by matching the numbers on his game piece to the ones on the car at the dealership, then they would give plaintiff a car. One of the issues in the case (though not on this appeal) is whether the contest rules required plaintiff to match the actual numbers on the car at the dealership or to match the "real" numbers, that is, the numbers that Mazda *intended* to be on the car at the dealership. By showing that defendant was Mazda's agent, plaintiff hopes to argue that Mazda is vicariously bound by defendant's statement (through Liska and Larkey) that plaintiff had won the car, as well as by the actions of whomever placed the numbers on the car at the dealership.

¶10 But the problem for plaintiff so far as this appeal is concerned is that regardless of whether this agency theory might be successful in holding Mazda liable for defendant's actions, it has no effect on defendant's own liability. Indeed, on these facts defendant cannot be liable under either a breach of contract or a promissory estoppel theory regardless of whether it is an agent or a principal. As a threshold matter, plaintiff has never alleged or offered any evidence that defendant is a party to a contract with plaintiff. Plaintiff argues that the contract in this case

is the contest rules, which are an enforceable contract between the sponsor of the contest and an entrant. See *Harlem-Irving Realty, Inc. v. Alesi*, 99 Ill. App. 3d 932, 935 (1981). Yet it is undisputed that Mazda, not defendant, sponsored this contest, and plaintiff has not offered any evidence to the contrary. Defendant cannot be bound as a principal to the contract if it was not a sponsor of the contest.

¶11 But neither can defendant be liable as an agent, given that a disclosed agent cannot be personally liable on a contract absent an explicit agreement otherwise. See *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 667 (2010) (noting that in Illinois, "where an agent discloses the name of his principal or where the party dealing with the agent knows that the agent is acting as an agent, the agent is not personally liable on the contract unless he so agrees."). Plaintiff attested in his affidavit that he believed that defendant was an agent of Mazda because of "the vast amount of Mazda data at the dealership and the use of the name, logos, and merchandise." Even if we assume that defendant was an agent of Mazda in running the contest, plaintiff's own statements demonstrate that defendant was a disclosed agent and therefore cannot be personally liable for Mazda's later breach of contract.

¶12 So plaintiff's breach of contract claim is unsustainable regardless of whether defendant is an agent of Mazda, and the result is the same for his promissory estoppel claim. Plaintiff's main contention is that Larkey and Leska's statements that plaintiff had won the contest constitute an enforceable promise to give him a car. This is insufficient to establish a promissory estoppel claim, which requires the plaintiff to prove that "(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." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009). Based on the evidence in

the record, defendant never made any unambiguous promise to give plaintiff the car. Indeed, the statements that plaintiff relies on are merely observations that plaintiff had won the contest, which by all accounts Leska and Larkey fully believed at the time.

¶13 Moreover, there is no evidence that plaintiff relied to his detriment on anything that Leska or Larkey said to him. Plaintiff argues that because he relied on their representation that he had won the contest, plaintiff did not take any steps to document the actual numbers that were in the vehicle at the dealership. Yet we cannot see how this would have helped him in this case. Based on the record, defendant does not deny that the actual numbers in the vehicle were the same as the ones on plaintiff's game piece. Defendant and Mazda's purported reason for refusing to deliver the prize to plaintiff was that his numbers did not match the "real" contest numbers, which has nothing to do with anything that Leska and Larkey may have said to plaintiff at the dealership. Plaintiff's reliance on Leska and Larkey's statements that he had won was no doubt disappointing, but it was not detrimental.

¶14 Plaintiff also challenges the summary judgment ruling on count III, which is his statutory fraud claim under section 2P of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/2P (West 2010)).[1] Section 2P states:

> "Offers of free prizes, gifts, or gratuities; disclosure of conditions. It is an unlawful practice for any person to promote or advertise any business, product, utility service, including but not limited to, the provision of electric, telecommunication, or gas service, or interest in property, by means of offering

[1] It is unclear precisely which statutory cause of action plaintiff is asserting in this count. Plaintiff cites section 2 (815 ILCS 505/2 (West 2010) in passing in his complaint and briefs, but he also repeatedly states that defendant's "conduct was in violation of the Consumer Fraud Act, and specifically in violation of 815 ILCS 505/2P." The distinction between the two sections matters a great deal because the elements are not the same. Defendant argued before the circuit court and also in its brief on appeal that count III is only a section 2P claim. As far as we can tell, plaintiff has never responded to this assertion in any way, so we assume that he has conceded the point. We will therefore treat count III as a section 2P claim only. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

> free prizes, gifts, or gratuities to any consumer, unless all material terms and conditions relating to the offer are clearly and conspicuously disclosed at the outset of the offer so as to leave no reasonable probability that the offering might be misunderstood."

¶15 The dispositive factual issue for a claim under section 2P is therefore whether the material terms and conditions for a free prize have been clearly and conspicuously disclosed. Based on the undisputed facts in the record, there is no doubt that they were in this case, at least as far as defendant's actions are concerned. (Mazda's actions are a different question, but one that is not before us on this appeal.) Plaintiff testified at his deposition not only that he read the contest rules before he entered the contest but also that Larkey and Leska gave him an additional copy of the rules at the dealership and explained exactly how to submit his claim for the prize. Paragraph 2 of the rules states in pertinent part:

> "To Play Match & Win: Take your 'Mazda 2007 Midwest Auto Show' Match & Win newspaper insert, e-mail or handout game piece to you local participating Mazda dealer or local auto show *** and match all of your sets of numbers against all of the sweepstakes number sets posted in and around the featured 2007 Mazda MX-5 Miata Power Retractable Hard Top Convertible Sport. *If all of your numbers match all of the Match & Win numbers posted, you are the winner of the Grand Prize, pending verification of eligibility*. To claim the Match & Win Grand Prize, mail your original game piece [along with other information to Family Choice, Inc.] *** *You are not a winner until your claim has been verified*." (Emphasis added.)

¶16 There is a certain amount of ambiguity in the rules regarding the two italicized sentences and exactly what kind of "verification" is necessary in order to be declared the winner, which plaintiff makes much of in arguing against summary judgment. But regardless of what we may think about the way this part of the rules is written, it is irrelevant to this appeal because the facts are clear that defendant provided the correct rules to plaintiff. In order to establish the proximate cause element of a section 2P claim, plaintiffs must prove that they were actually deceived. See *Avery v. State Farm*, 216 Ill. 2d 100, 199 (2005). Plaintiff himself testified at his deposition that Leska not only gave plaintiff a copy of the rules at the dealership but also explained what plaintiff had to do in order to claim the prize. While there is certainly a dispute about the meaning of the rules, plaintiff has not identified anything that Leska said about the rules that was deceptive.

¶17 Rather, plaintiff's sole contention is that Leska and Larkey committed fraud by telling plaintiff that he had won when in fact he had not.[2] But this argument does not work for a section 2P claim against defendant because the only issue is whether the terms of the contest were adequately disclosed by the offeror. If there were any insufficiently disclosed rules or conditions in this contest, then the deceptive party would necessarily have been Mazda because it, not defendant, drafted and promulgated of the contest rules and controlled how the contest was run. Of course, given that Mazda remains in the case before the circuit court and did not appeal from

[2] Although it does not ultimately matter to our resolution of this appeal, plaintiff's argument on this point is internally inconsistent and very confusing. Plaintiff maintains at some points that he did in fact win under the terms of the contest by matching the numbers that were posted at the dealership. But in that case, Leska and Larkey would necessarily have been telling the truth when they said that plaintiff had won, meaning that there was no deception and thus no fraud by defendant. Yet in attempting to sustain his argument on the fraud issue, plaintiff at other points argues that Leska and Larkey deceived him because he did *not* in fact win, which is directly contrary to his earlier argument. As an issue of fact, plaintiff cannot have it both ways: he either won the contest according to the disclosed rules or he did not. This appears to still be a live issue in the case as to Mazda, but it is not material to the question of summary judgment on plaintiff's claims against defendant.

the circuit court's summary judgment ruling, this is not an issue that is before us on this appeal so we have no opinion one way or the other on it.

¶18 This brings us to the dispositive fact for the section 2P claim against defendant: Mazda sponsored this contest, not defendant. Liability under section 2P is expressly limited to "any person who promote[s] or a advertise[s]" a product by "*offering* free prizes." (Emphasis added.) 815 ILCS 505/2P (West 2010). As we discussed above, Mazda was the one that offered the MX-5 as a prize to entrants in its contest. If defendant was merely Mazda's agent in the contest, as plaintiff himself has contended throughout this case, then defendant cannot be liable because it was not the principal on the contract and therefore not the ultimate offeror, meaning there is no liability under section 2P. Yet the result is the same even if defendant was *not* Mazda's agent because plaintiff's own testimony established that he entered the contest through Mazda's website, not defendant's. Thus any offer of a free prize that might have been made in this case had to have been made at the time that plaintiff entered the contest and can only have come from Mazda. Defendant did not make the offer, so defendant cannot be liable under section 2P.

¶19 The dissent notes that section 1(c) of the Act defines a "person" to include not only principals but also their agents for purposes of liability. See 815 ILCS 505/1(c) (West 2010) ("The term 'person' includes any natural person or his legal representative, partnership, corporation, trust, business entity or association, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof."). The dissent argues that section 1(c)'s definition of person indicates that if defendant was an agent of Mazda in offering the vehicle as a free prize, then defendant would be liable under section 2P because defendant participated in a fraudulent contest.

¶20 There are two problems with this line of argument from our perspective. First, although we agree with the dissent that the facts are quite clear that defendant participated in the contest, the evidence is also clear that defendant never participated in the offer, that is, the rules of the contest. Section 2P imposes liability if a "person" fails to disclose the material terms and conditions "at the *outset* of the offer." (Emphasis added.) Plaintiff himself conceded that he entered the contest through Mazda's website, and there is no evidence in this case that defendant was involved with drafting the contest rules or with the administration of the contest. Although it is undisputed that defendant was involved in the contest, this is insufficient for liability under section 2P.

¶21 The case cited by the dissent is instructive. In *Garcia v. Overland Bond & Investment Co.*, 282 Ill. App. 3d 486, 496 (1996), the plaintiffs sued a car dealership and its manager for allegedly deceptive advertisements. See *id.* at 488-90. (Although *Garcia* dealt with a fraud claim under section 2 rather than section 2P, its analysis of how vicarious liability works under section 1(c) is still useful here.) The trial court dismissed the plaintiffs' claims against the manager individually for failure to state a legally cognizable claim, but we reversed on appeal. We distinguished the general rule in Illinois, which is that "corporate employees are not vicariously liable for tortious acts of the corporation in which they do not participate," from a cause of action under the Consumer Fraud Act, which authorizes liability against not only corporations themselves but also their agents and employees. *Id.* at 496. We held that the plaintiffs had adequately alleged that the manager directly participated in the allegedly fraudulent advertising scheme and could therefore be liable under section 2. See *id.* ("The plaintiffs allege that [the manager] had authority to approve Car Credit Center's advertisements and did so despite his knowledge that Car Credit Center did not enter into sales and loans on the

terms advertised. He knew this because he allegedly approved almost all of the loans. We believe these allegations sufficient, if proved, to establish [the manager's] direct participation in the defendant's deceptive practice of advertising goods with the intent not to sell them as advertised.").

¶22 The difference between this case and *Garcia* is that there is no evidence that defendant actively participated in the allegedly fraudulent act. There is no evidence that defendant had authority to approve the rules of the contest or was even involved with drafting them and no evidence that defendant knew at the outset of the contest that the "real" rules required plaintiff to match the "real" numbers. In fact, the evidence shows exactly the opposite, given that Leska and Larkey originally thought that plaintiff had won the contest when he matched the numbers on the car at the dealership. Plaintiff's section 2P claim depends on whether the material conditions of the contest were disclosed at the time of the offer, but without at least some evidence showing that defendant directly participated in the fraudulent offer at the time that it was made there can be no liability under section 2P.

¶23 This brings us to the second problem. It is well settled under Illinois law that principals are generally liable for the tortious acts of their agents, but agents are generally not liable for the tortious acts of their principals. See *id.* The Consumer Fraud Act does not change the law of agency and somehow make agents liable for the fraud of their principals merely because they were agents. Indeed, *Garcia* demonstrates that there must be some level of direct participation by an agent in the fraudulent scheme in order to support a cause of action. But under the dissent's line of reasoning, if a principal fails to materially disclose the rules of a contest that offers a free prize, then every agent or employee involved in the contest is automatically liable under section 2P for fraud even if they were not involved in the fraudulent failure to disclose.

Such an interpretation would seem to impose personal liability on even minor employees in every single statutory fraud case. Indeed, under this interpretation Larkey and Liska would arguably be personally liable alongside defendant and Mazda because they were involved in the contest. We cannot take such a broad view of the Consumer Fraud Act, and we agree with *Garcia* that there must be some evidence of an agent's direct participation in the fraudulent offer in order to impose liability. Even if we assume that defendant was Mazda's agent in the contest, there is no evidence that it directly participated in the fraudulent failure to disclose material terms and conditions of the contest.

¶24 The undisputed facts in the record establish that plaintiff cannot prove the necessary elements for his breach of contract, promissory estoppel, and section 2P fraud claims against defendant. The circuit court was therefore correct to grant summary judgment in favor of defendant.

¶25 Affirmed.

¶26 JUSTICE HARRIS, dissenting.

¶27 I respectfully dissent.

¶28 The trial court erred in granting summary judgment for defendant on plaintiff's section 2P claim. My colleagues affirm the trial court's actions by wrongly concluding, "If defendant was merely Mazda's agent in the contest, as plaintiff himself has contended throughout this case, then defendant cannot be liable because it was not the principal on the contract and therefore not the ultimate offeror, meaning there is no liability under section 2P." *Supra* ¶ 17.

¶29 The Consumer Fraud Act confers a statutory right of action created by the legislature. *Garcia v. Overland Bond & Investment Co.*, 282 Ill. App. 3d 486, 496 (1996). Section 10(a) of

the Act states that those damaged by violations of the Act may sue "any person" who violates the Act. 815 ILCS 505/10(a) (West 2010). Section 1(c) states:

> "The term 'person' includes any natural person or his legal representative, partnership, corporation, trust, business entity or association, *and any agent,* employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof." (Emphasis added.) 815 ILCS 505/1(c) (West 2010).

¶30 Plaintiff has well pleaded and shown facts upon which it can reasonably be concluded that defendant acted as an agent in offering a Mazda convertible vehicle as a free prize in Mazda's contest. Contrary to the majority, I believe that sufficient facts have been shown for a jury to conclude that defendant was a local Mazda dealership participating in the offering of the vehicle as a free prize covered by section 2P. In accordance with the rules and procedures of Mazda's contest, defendant displayed the vehicle in their showroom and placed the cards containing the lucky matching numbers on the vehicle. When plaintiff took his game piece to defendant, defendant's representatives Larkey and Liska compared all of the numbers on the vehicle with plaintiff's game piece and confirmed plaintiff was the winner of the vehicle. They instructed him on how to collect his prize. It was later discovered that someone had placed another card with numbers in the trunk of the vehicle which also matched plaintiff's game piece. Thereafter, Mazda denied plaintiff's prize claiming his numbers did not match the "winning" numbers Mazda believed were in the trunk of the vehicle.

¶31 Plaintiff has also sufficiently pleaded facts supporting a cause of action for statutory fraud against defendant as an agent of Mazda. Section 2P of the Act demands that all material terms and conditions relating to the offer be clearly and conspicuously disclosed. The offer

required plaintiff to match his numbers with three sets of numbers "on the vehicle." The clear and conspicuously disclosed terms of the offer simply require plaintiff to match his numbers with the sweepstakes numbers displayed on the vehicle. In reading the terms and conditions one reasonably presumes that the numbers displayed on the cards are the official contest numbers authorized by Mazda. There is nothing in the terms and conditions that indicate the numbers on the cards may not be the actual "winning" sweepstakes numbers for winning the prize.

¶32 Based on these facts the trier of fact could very well conclude that defendant acted as an agent of Mazda and participated in an unlawful practice violative of Section 2P. Since a genuine issue of material fact exists, I believe summary judgment for the defendant was improper.

¶33 Accordingly, I would reverse and remand.