



¶ 3 Plaintiffs were injured in a motor vehicle collision in Tennessee on October 2, 1989. They retained defendants to represent them. Defendants, however, failed to file plaintiffs' suit within the appropriate time period under the applicable Tennessee statute of limitations. Plaintiffs' case was refiled in the Northern District of Mississippi but was dismissed. That decision was then appealed to the United States District Court of Appeals for the fifth circuit. This appeal was also dismissed, however, because no brief was filed. While a motion to reinstate the appeal was filed, defendants did not take any other action with respect to the case.

¶ 4 On June 10, 1994, plaintiffs entered into an interim agreement with defendants requiring defendants to pay plaintiffs the sum of \$10,000 from settlement proceeds, \$2,500 a month starting on July 15, 1994, and on the fifteenth of each month thereafter, and 20% of every contingent fee defendants received in excess of \$25,000 until such payments reached \$480,000. The parties further agreed that should the then-pending appeal be resolved against plaintiffs, a formal contract was to be entered into identifying the liability of defendants and fixing the amount of damages. The parties never entered into a second contract.

¶ 5 Between June 18, 1994, and September 29, 2003, defendants paid plaintiffs approximately \$254,365.74. Defendants stopped paying thereafter because they thought they had paid enough based on their assessment of what the original case was worth. Because the statute of limitations for plaintiffs' claim against defendants for malpractice expired on October 2, 1992, plaintiffs brought suit against defendants for breach of contract for their failure to pay \$2,500 on all the dates stated in the contract and in failing to pay the full amount of \$480,000. Initially the trial court entered summary judgment against plaintiffs. This decision was reversed on appeal, however. See *Herrmann v. Runge*, No. 5-07-0106 (2008) (unpublished order under Supreme Court Rule 23 (eff. July 1, 1994)). The second time around, summary judgment was entered in favor of plaintiffs for breach of contract in

the amount of \$213,134.26 plus costs. Plaintiffs had also alleged in their complaint that defendants committed common law fraud when they entered into the contract with plaintiffs in promising to pay \$480,000 when they knew they would not pay the full amount. Plaintiffs claimed that they relied on that promise in foregoing their opportunity to sue defendants for legal malpractice. The trial court entered summary judgment in favor of defendants on the issue of common law fraud. The court also denied plaintiffs' request for prejudgment interest. All parties appeal.

¶ 6 Defendants argue on appeal that the court erred in granting summary judgment in favor of plaintiffs because the interim agreement was an unenforceable contract given that it set forth no consideration on the part of plaintiffs. Defendants further argue our first decision made no determination of the enforceability of the interim agreement, only the duration of the obligation under the agreement. Defendants also assert that even if the interim agreement is an enforceable contract, there was no breach of contract because plaintiffs failed to perform as required by settling or seeking a judgment from defendants. Defendants further point out that the terms of the interim agreement are ambiguous since the agreement anticipated a final agreement which never occurred. Given that the parties acted in a manner contrary to the exact terms of the interim agreement, the court should have considered parol evidence to determine the terms of the agreement. Since those terms are not in the record, it cannot be determined whether the parties performed their required obligations. According to defendants, the court therefore erred in granting summary judgment in favor of plaintiffs.

¶ 7 We initially note that summary judgment is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Chatham Foot Specialists, P.C. v. Health Care Service Corp.*, 216 Ill. 2d 366, 376, 837 N.E.2d 48, 54 (2005); *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335, 775 N.E.2d 987, 994

(2002). Appellate review of a trial court's ruling on a motion for summary judgment is *de novo*. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004); *Cain v. Finnie*, 337 Ill. App. 3d 318, 320, 785 N.E.2d 1039, 1041 (2003).

¶ 8 Here, plaintiffs and defendants entered into a contract, drafted by defendants, that stated defendants were to pay plaintiffs \$2,500 a month plus other contingent fees until the total payment reached \$480,000. Defendants paid plaintiffs a total of \$266,865.74 under the contract. After September 2003, no further payments were made. Plaintiffs' complaint alleged that defendants breached the contract when they failed to pay \$2,500 on all of the dates stated in the contract and failed to pay the entire \$480,000. As we determined on the first appeal to our court, the provisions and obligations under the interim agreement did not terminate until the payments totaled \$480,000. In other words, defendants' obligations under the agreement continued until the full amount of \$480,000 had been paid. As defendants did not pay the full amount, defendants breached the agreement.

¶ 9 Defendants argue the contract is not enforceable, however, because there was no consideration from plaintiffs to defendants. Plaintiffs, however, did not sue defendants for malpractice in consideration for full payment under the contract. Defendants entered into the contract because they were accepting responsibility for failing to file suit on their clients' behalf within the statute of limitations. Rather than risk a malpractice suit being instituted against them, defendants agreed to pay the amount stated in the contract over a period of time. By agreeing to accept this amount, plaintiffs also agreed to forego filing a malpractice suit against defendants and gave up the potential for obtaining more compensation in that suit and in a lump-sum amount rather than in installment payments over a long period of time. There is no question that forbearance is adequate consideration for a contract. *Redarowicz v. Ohlendorf*, 92 Ill. 2d 171, 179, 441 N.E.2d 324, 328 (1982).

¶ 10 Defendants also argue that plaintiffs were required to settle or seek a judgment from

defendants. Because plaintiffs failed to do so, defendants assert plaintiffs failed to perform this condition of the contract and therefore are not entitled to recover the balance due under the contract. The contract is the settlement of plaintiffs' claim against defendants. Plaintiffs already had a contract with defendants. The fact that it was called an interim contract and could be offset against any future judgment does not make it unenforceable as written. We agree with plaintiffs that defendants' argument is nonsensical.

¶ 11 Defendants next argue they completed their part of the contract with the first payment of \$2,500 given that the contract lapsed with the resolution of plaintiffs' appeal in the underlying untimely filed case. As we stated last time on appeal, "the provisions and obligations under the 'Interim Agreement' do not terminate until the payment reaches the amount of \$480,000." *Herrmann*, No. 5-07-0106, order at 8.

¶ 12 For their final argument, defendants contend that the terms set forth in the interim agreement are not a complete expression of the parties' agreement. Defendants attempt to find ambiguity in plaintiffs' failure to sue them when payments were late. According to defendants, because there is ambiguity, parol evidence was necessary to determine the parties' agreement. Without the admission of such parol evidence, the entry of summary judgment was therefore erroneous. We disagree. While acceptance of late payments may be a waiver of the requirement of timely payment (see *American National Bank & Trust Co. v. Dominick*, 154 Ill. App. 3d 275, 281, 507 N.E.2d 512, 515 (1987)), a party may still sue for breach of that contract when there has been substantial nonperformance (see *Builder's Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 58 Ill. App. 3d 100, 103, 373 N.E.2d 863, 867 (1978)). We see no ambiguity in this instance, and the trial court's entry of summary judgment in favor of plaintiffs was not in error.

¶ 13 Plaintiffs counter on appeal that the trial court erred in entering summary judgment in favor of defendants and against plaintiffs on the issue of fraud. This time we disagree with

plaintiffs. It has been clearly established that the elements of an action for fraud and deceit include a statement of a material fact, made for the purpose of inducing the other party to act, known to be false by the maker, and not known to be false by the other party but reasonably believed to be true, and upon which he relies and acts to his damage. *Zaborowski v. Hoffman Rosner Corp.*, 43 Ill. App. 3d 21, 23, 356 N.E.2d 653, 654-55 (1976). A promise to perform an act, even though the party intends at the time he makes the promise not to perform, is an insufficient false representation to constitute fraud. *Zaborowski*, 43 Ill. App. 3d at 23, 356 N.E.2d at 655. Here, plaintiffs alleged that defendants entered into the agreement with plaintiffs for the the purpose of inducing them to forego filing a malpractice action against defendants. They further argued that defendants made the promised payments for a period of time in order to induce plaintiffs to forego filing that action during the time they could have done so. According to plaintiffs, the agreement was the device employed by defendants to accomplish the fraud. Plaintiffs, however, failed to present any evidence that any of defendants' statements were false at the time the agreement was entered into and that defendants knew or believed those statements to be untrue. No evidence was presented to support the claim that defendants entered into the agreement intending to defraud and deceive plaintiffs. In fact, the evidence reveals that defendants continued to make payments after 1996, the year that plaintiffs' malpractice suit was time-barred. Defendants did not stop paying as part of a plan to defraud plaintiffs; rather, defendants stopped paying because they thought they had paid out more than the initial case was worth. *Cf. Pepper v. Marks*, 168 Ill. App. 3d 253, 522 N.E.2d 688 (1988) (defendant made promise he had no intention of keeping to induce plaintiff to sign contract). The trial court correctly granted summary judgment on the issue of fraud in favor of defendants against plaintiffs.

¶ 14 Plaintiffs also argue on appeal that the court should have awarded prejudgment interest on the judgment entered in their favor. The decision to award prejudgment interest

under section 2 of the Illinois Interest Act (815 ILCS 205/2 (West 2008)) is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *LaGrange Memorial Hospital v. St. Paul Insurance Co.*, 317 Ill. App. 3d 863, 873, 740 N.E.2d 21, 30 (2000). This time we agree with plaintiffs and find an abuse of the court's discretion. Pursuant to section 2, prejudgment interest may be awarded if the creditor can show that the money was due, or after the lapse of a reasonable time for paying the amount due, and the amount due is liquidated or subject to an easy determination by calculation or computation. *Couch v. State Farm Insurance Co.*, 279 Ill. App. 3d 1050, 1054, 666 N.E.2d 24, 27 (1996). Here the amount still due under the contract was easily determined by simple subtraction. While there is support for a denial of interest when there is a dispute as to the amount due under the contract, where the dispute, as here, is whether payment is due at all does not preclude an award of prejudgment interest, especially when the sum due is easily ascertainable. See *Kemnetz v. Elliott Farmers Grain Co.*, 136 Ill. App. 3d 226, 231, 482 N.E.2d 1076, 1080 (1985). Putting aside the possible contingent fee payments, defendants promised to pay plaintiffs \$2,500 a month. Starting in 2001, defendants failed to make each monthly payment. Calculation of prejudgment interest beginning from the first shortfall was therefore appropriate. We agree with plaintiffs that defendants caused them their right to recover for the injuries they received in a serious motor vehicle collision. Plaintiffs should not have had to take a further loss by being deprived of the money defendants promised to pay them for losing that right once defendants decided they no longer wanted to pay the balance due under their agreement. We therefore reverse this cause on the issue of the court's failure to award prejudgment interest and remand for calculation of the amount of prejudgment interest due.

¶ 15 For the aforementioned reasons, we affirm the award of summary judgement in favor of plaintiffs on the issue of the enforceability of the interim contract, and we affirm the award

of summary judgment in favor of defendants on the issue of fraud. We further reverse the denial of prejudgment interest and remand this cause for the calculation of such interest.

¶ 16 Affirmed in part and reversed and remanded in part.