2012 IL App (2d) 120242-U
No. 2-12-0242
Order filed February 26, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PAUL DUNKLAU,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 10-AR-3570
	)	
COUNTY OF DU PAGE,	)	Honorable
	)	Ronald D. Sutter,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's finding that there was no employment contract or agreement was not against the manifest weight of the evidence where plaintiff failed to acknowledge, let alone address and refute, his own testimony that no such contract or agreement existed or the express disclaimers of defendant's policy manual that it did not constitute a contract or an agreement.

¶ 2 Plaintiff, Paul Dunklau, appeals from the trial court's judgment in favor of defendant, County of Du Page. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Dunklau was appointed a full-time Du Page County Deputy Sheriff in March 1984. In March 2007, the Du Page County Sheriff opened a criminal investigation into the unauthorized removal of United States currency from the evidence vault of the Sheriff's office. Dunklau was placed on paid administrative leave, and his powers as a deputy sheriff were suspended. On April 26, 2007, Dunklau sent a letter to Sheriff John Zaruba, informing him that he was retiring, effective May 3. A "NOTICE OF EMPLOYEE SEPARATION," was signed by a representative of the sheriff's office on April 30. The form provided 28 check-boxes for the reason for separation; "Voluntary Retirement" was checked. Although the form instructed that an explanation for the reason for separation be provided in addition to the checked box, no explanation was provided. In addition to 34.5 hours of wages due, the form showed 402.08 hours of earned vacation, 478.34 hours of earned sick time, and 900.0 hours of "retention." Dunklau received his final paycheck, which included his hourly wages and payment for unused sick and vacation time.

¶ 5 On September 14, 2007, Dunklau was indicted on five felony charges; he subsequently pleaded guilty in November 2009 to one misdemeanor count of attempt (official misconduct) (720 ILCS 5/8-4(a) (West 2006)) and was sentenced to 24 months' probation. Dunklau's probation was closed satisfactorily on November 23, 2011.

¶ 6 Starting shortly after he received his final check in May 2007, Dunklau made several requests to the County to receive benefits under the County's Employee Retention Benefit Program (Retention Program), a County program that provided "retention incentives in order to provide long term employees income protection for retirement in the form of a capital accumulation program." The program provided additional paid days to employees "[a]t the time of voluntary separation or layoff" for various employment milestones of at least 10 years. Dunklau had been employed for 22

years at the time of his resignation. The County refused to make any payment to Dunklau under the program.

¶ 7 On April 28, 2011, Dunklau filed a one-count complaint against the County pursuant to the Illinois Wage Payment and Collection Act (820 ILCS 115/1 *et seq.* (West 2010)) (Wage Act), seeking at least $39,600 in unpaid benefits under the Retention Program, along with interest, penalty, and attorney fees. After the trial court denied cross-motions for summary judgment, Dunklau filed a two-count amended complaint, adding an alternative count alleging breach of contract. Dunklau then filed a petition seeking a declaratory judgment that the County was subject to the Wage Act; the trial court granted the petition and entered a declaratory judgment that the Wage Act applied to Dunklau.

¶ 8 The case proceeded to bench trial, after which the trial court found in favor of the County on both counts of the amended complaint. The trial court stated that the primary issue was "if the Plaintiff's separation from the Sheriff's Office was voluntary or involuntary." It then concluded that Dunklau's placement on administrative leave "was the beginning, in my opinion, of an involuntary separation." The fact that Dunklau tendered his letter of resignation while the investigation was pending "does not equate to a voluntary separation," and the fact that Dunklau quit before any charges were filed with the Sheriff's Merit Commission "does not change the fact that this was an involuntary separation."

¶ 9 The trial court also concluded that there was no employment contract or employment agreement; thus, the Wage Act did not apply under the facts of this case. The court explained that the declaratory judgment that it had previously entered indicated that "the Act applies to the Sheriff,

and I believe it does. I just don't believe that the facts of this case support a finding under the Wage Payment and Collection Act." This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 Dunklau first contends that the trial court erred in finding that no employment agreement existed. We will not disturb a trial court's judgment following a bench trial unless that judgment is against the manifest weight of the evidence. *Bohne v. La Salle National Bank*, 399 Ill. App. 3d 485, 494 (2010). A decision is against the manifest weight of the evidence where all reasonable people would find that the opposite conclusion is clearly apparent or where the decision is arbitrary, unreasonable, or not based on the evidence presented. *Id*. If there are different ways to view the evidence, or alternate inferences can be drawn from it, we will accept the view of the trial court so long as it is reasonable. *Id*.

¶ 12 The Wage Act applies "to all employers and employees in this State, including employees of units of local government and school districts, but excepting employees of the State or Federal governments." 820 ILCS 115/1 (West 2010). Payments made to separated employees are to be termed "final compensation" and shall be defined as "wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties." 820 ILCS 115/2 (West 2010). To state a claim under the Wage Act, a plaintiff must plead that wages or final compensation is due to him as an employee from an employer under an employment contract or agreement. *Landers-Scelfo v. Corporate Office Systems, Inc.*, 356 Ill. App. 3d 1060, 1067 (2005).

¶ 13 The County's Exhibit No. 5 was a copy of the 2002 "Du Page County Board Personnel Policies." Section 3.11 covers the Retention Program at issue here. Eligibility for the program was extended to "[a]ll full and part-time employees who are required to participate in the [IMRF] and began their employment with Du Page County on or before November 30, 2002."[1] Employees begin accrual of retention days after five years of service; at 20 years of continuous service (the maximum), an employee would have accrued 120 paid days under the program. Eligibility to receive the benefit begins at age 55 with 10 years of service; however, eligibility with 20 years of continuous service is "independent of age." Benefits are to be paid out "[a]t the time of voluntary separation or layoff." Involuntarily terminated employees are not eligible for the program.

¶ 14 The first page of the manual, entitled "OVERVIEW," states that "this manual should be used for your information and reference; however, it is *not intended to constitute an employment agreement or contract*." (Emphasis added.) Further, "[t]he County reserves the right to vary these policies to meet individual needs." On the same page, in a section under the heading of "Waiver," the manual states, "*This handbook is not to be construed as an employment contract or to create contractual rights, but rather to serve as a guideline for day to day policies*." (Emphasis in original). The County's reservation of "the right to vary these policies to meet individual needs" is repeated in the "Waiver" section.

¶ 15 During cross-examination of Dunklau at trial, the following colloquy took place:

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[1]Pursuant to section 3.3 of the policy manual, "All regular full-time and regular part-time employees who are budgeted to work at least twenty (20) hours per week are *required* to participate in and to contribute to IMRF." (Emphasis added.).

"Q [Assistant State's Attorney]: Paul, you never had an employment contract with the Sheriff of Du Page County during your 20-plus years of service. Is that correct?

A. [Dunklau] That's correct.

Q. And you never had an agreement with the County of Du Page, an employment agreement. Is that also correct?

A. That's correct.

Q. You never signed anything in the nature of an employment agreement with either the County or the Sheriff?

A. No.

Q. And there wasn't any union contract that you were subject to regarding your employment as a Deputy Sheriff. That's also correct, is it not?

A. Yes, that's correct."

¶ 16 We cannot conclude that the trial court's finding that there was no employment contract and no employment agreement was against the manifest weight of the evidence. Dunklau himself clearly testified that no such contract or agreement existed. However, Dunklau never even addresses this testimony in his appellate briefs. While his position on appeal contradicts his testimony below, he completely ignores that testimony. Further, while Dunklau cites to the "Du Page County Board Personnel Policies," especially Section 3.11 (the Retention Program) as evidence of an agreement, he never addresses the "OVERVIEW" page of the manual and the statements contained thereon that the manual "is not intended to constitute an employment agreement or contract" and "*is not to be construed as an employment contract or to create contractual rights*" (emphasis in original) and the

County's twice-made reservation of "the right to vary these policies to meet individual needs."[2] Needless to say, Dunklau has also failed to address case law that holds that disclaimers in an employee handbook or manual can negate contract formation. See *Duldulao v. St. Mary of Nazareth Hospital*, 115 Ill. 2d 482, 491 (1987); *Hanna v. Marshall Field & Co.*, 279 Ill. App. 3d 784, 790 (1996).

¶ 17 We can affirm the trial court on any basis supported by the record. *Mutual Management Services, Inc. v. Swalve*, 2011 Il App (2d) 100778, ¶ 11. Here, we are presented with Dunklau's testimony that no contract or employment agreement existed and the County's written assertions that Dunklau's claimed basis of a contract or agreement is neither as well. Yet Dunklau fails to even acknowledge this evidence, let alone attempt to refute this evidence and tell us why it is insufficient to support the trial court's judgment. The burden is on Dunklau to demonstrate to this court that the trial court's findings and judgment were against the manifest weight of the evidence. He may not sustain his burden by ignoring the evidence supporting the judgment. We are constrained to consider it regardless of plaintiff's failure to do so. Considering the failure to address the evidence supporting the judgment and, thus, failing to otherwise refute it, we determine that the trial court's judgment with regard to the lack of an agreement is not against the manifest weight of the evidence.

¶ 18 Because we conclude that the trial court's finding that there was no employment contract or agreement was not against the manifest weight of the evidence, we need not address Dunklau's contention that the trial court erred in finding that he was involuntarily terminated.

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[2]Inexplicably, the County fails to cite to the "employment agreement" and reservation-of-right-to-vary language in its brief.

¶ 19 Dunklau also contends that the trial court's "effort to absolve" the County of its obligation to pay him the retention benefits amounts to a violation of 42 U.S.C. § 1983. However, Dunklau did not file a claim alleging such a violation in the trial court. He did make an oral request, after the trial court announced its decision, for leave to amend the complaint to include "based on this decision of involuntary separation a 1983 claim for wrongful termination," which the trial court denied. Dunklau argues that this denial "compounded" the error. However, Dunklau never develops any argument regarding the trial court's denial of his oral motion, and any argument regarding a §1983 claim that was never made below is irrelevant. Proof without pleadings is as defective as pleadings without proofs. *People ex rel. Klaeren v. Village of Lisle*, 352 Ill. App. 3d 831, 846 (2004). We find no error here.

¶ 20 For these reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 21 Affirmed.