

2014 IL App (2d) 130591-U
No. 2-13-0591
Order filed March 12, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CHRIS CHEREKOS and SUSAN)	Appeal from the Circuit Court
CHEREKOS,)	of Kane County.
)	
Plaintiffs-Appellants,)	
)	
v.)	No. 10-L-424
)	
LINDOO INSTALLATIONS, INC.,)	
WILLIAM LINDOO, and RHONDA)	
LINDOO,)	Honorable
)	James R. Murphy,
Defendants-Appellees.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted defendants' motions for summary judgment where there were no genuine issues of material fact, and defendants were entitled to judgment as a matter of law.

¶ 2 Plaintiffs, Chris Cherekos and Susan Cherekos, were hired by defendants, William (Bill) Lindoo and Rhonda Lindoo, to work at defendant, Lindoo Installations, Inc. (Lindoo). Following plaintiffs' termination from Lindoo, they filed a three-count verified complaint alleging intentional misrepresentation/fraud (count I), promissory estoppel (count II), and breach

of an oral contract (count III). Plaintiffs subsequently amended their complaint to add count IV, alleging spoliation of evidence. The trial court granted defendants' motion for summary judgment on counts I through III and later granted defendants' motion for summary judgment on count IV. Plaintiffs timely appeal. For the following reasons, we affirm.

¶ 3

I. BACKGROUND

¶ 4 We derive the following facts from the complaint, plaintiffs' answers to interrogatories, and plaintiffs' deposition testimony. Lindoo was in the business of providing installation, repair, and dismantling services to the material handling industry. Lindoo was 49% owned by Bill and 51% owned by Rhonda, his wife. Susan was hired through a temporary staffing agency to work at Lindoo for 90 days beginning in June 2006. In August 2006, Bill told Susan that "the business could some day [*sic*] be [hers]" if she became a permanent employee and learned the business. In September 2006, defendants hired Susan to be their office manager at an annual salary of approximately \$42,000. Throughout the remainder of 2006, Bill made comments to Susan that the business would one day be hers and that she was "the next generation."

¶ 5 During 2007, Bill continued making similar comments and was "prodding" Susan to make a commitment to Lindoo. Early in 2007, Susan committed herself to learning the business. Susan testified that her promise to continue her employment was not based on Bill's promise to transfer the business to her. Bill gave Susan a company car in May 2007. In November 2007, Bill had heart surgery. Thereafter, his work hours were sporadic and drastically reduced. In December 2007, Susan faxed two letters to Rhonda requesting a salary increase. Susan explained at her deposition that she did not mention the business transfer in the letters "[b]ecause it was a very vague possibility at that point." As of the end of 2007, Susan did not believe that Bill was bound to transfer ownership of the business to her.

¶ 6 In 2008, there was “on and off” communication about Bill’s transferring the business to Susan. On October 23, 2008, Bill asked Susan if she was “ready,” because he wanted to retire. Susan confirmed that she felt she had learned the business but did not want to be a sole owner. She wanted to partner with her husband, Chris. At that point, Bill and Susan verbally agreed that they would meet with Chris to discuss transferring the business. At the end of October 2008, Susan asked Bill if she should hire an attorney. Bill advised that there was no need since he had not yet decided on the details of the arrangement. Susan believed that she did not need an attorney until they had agreed upon “specific terms.” She never consulted with an attorney or any other professional about the business transfer.

¶ 7 On November 22, 2008, Susan, Chris, and Bill had a meeting. The parties agreed that Lindoo would hire Chris to learn how to quote jobs. Chris would begin training in December but would not be on the payroll until January 1, 2009. They agreed that Chris’s annual salary would be \$70,000. At the time of the meeting, Chris had been unemployed for a couple of weeks. Chris had been working for \$78,000 per year as a mortgage underwriter but was let go when the facility at which he had been working closed. The parties agreed that Susan would take on more responsibility for project management and would be in charge of the work crews. Susan’s salary was about \$72,000 at the time of the meeting.

¶ 8 Also at the November 22, 2008, meeting, the parties talked about transferring ownership of the business from defendants to plaintiffs over a period of time. They discussed designating a percentage of plaintiffs’ salaries as equity in the business. They initially talked about 5%, but Bill never provided a firm percentage or dollar amount. According to Susan, plaintiffs would not receive an actual salary increase; rather, as they accrued equity in the business, there would be a “stock ownership transfer slowly until Bill was completely phased out.” The parties anticipated

that the transfer would commence on January 1, 2009, and take about two to three years to complete. During the transition time, Bill would receive profits from the business commensurate with his stock ownership. Plaintiffs believed that, at the end of the transition period, they would owe some lump sum to defendants. The parties also discussed Bill's remaining with Lindoo as a consultant, but they did not discuss his consulting salary. The parties did not discuss specific terms of the sale; no purchase price was discussed. Bill mentioned that the business was worth between \$4 and \$6 million. Plaintiffs conducted no independent research to ascertain the business's value.

¶ 9 About one week after the November 22, 2008, meeting, Susan sent an email to Bill and Rhonda to confirm the substance of the meeting. She could not recall at her deposition if she had included any of the potential terms of the parties' agreement in the email. Susan said that she thanked Bill for the meeting and expressed plaintiffs' excitement about becoming the owners.

¶ 10 Beginning in December 2008, Bill taught Chris how to quote jobs, and Chris familiarized himself with the process by reviewing old bids. During the week of December 14, 2008, Susan telephoned Rhonda to make certain that Rhonda had a complete understanding of Bill's agreement with plaintiffs. Rhonda told Susan that she was excited about the prospect of more travel and relaxation time. She said she supported Bill's commitment to plaintiffs and agreed that a two to three-year transition was a good idea. At the end of December 2008, Bill told plaintiffs that he had discussed their agreement with his financial advisor, who said that it "was an excellent way to go about transferring ownership." Bill also indicated that he was extremely pleased with Chris's ability to learn the business so quickly and wanted to continue with the agreement to transfer ownership of the business to plaintiffs.

¶ 11 Susan considered herself an owner beginning in January 2009. She considered talking to

a lawyer but did not do so, because plaintiffs “didn’t have specific numbers from Bill that he promised to give us.” Chris testified, “Even though stock ownership wasn’t being transferred, it was, from the start, you are the owners, you’re to think like owners.” Susan acknowledged that she did not report any business income or loss on her 2009 personal income tax return because she “did not have anything in writing.” Plaintiffs repeatedly asked Bill for the specific terms of the agreement both verbally and by email. Bill never provided a specific price term, percentage of salary that would go toward equity, duration of the transition, or the lump sum amount due. Susan testified in her deposition that she “had an idea in mind of what [she] wanted to pay” for the business, which was “[s]omewhere around a million dollars.”

¶ 12 In the spring and fall of 2009, Bill acted “increasingly violent and erratic.” Though Susan was concerned that Bill was having “second thoughts,” Bill reassured Susan that plaintiffs would still get the business because they had “made a deal.” Bill introduced plaintiffs to Lindoo customers as the “next generation” and told customers that he was transitioning ownership of the business to plaintiffs. Bill told both customers and employees that they should deal with plaintiffs. Bill represented that he was retiring and phasing himself out.

¶ 13 On January 8, 2010, Bill called a meeting at the office with plaintiffs.¹ Rhonda and defendants’ attorney were also present. Bill terminated plaintiffs’ employment. Bill said that, because of “economic conditions,” he was “not willing to move forward.” Plaintiffs understood

¹ Michael Peterson was also present. Michael and plaintiffs’ daughter, Cassandra, were engaged to be married at that time. At some point, Michael and Cassandra had been hired by Lindoo. Peterson was terminated at the January 8, 2010, meeting along with plaintiffs. The record does not expressly reveal Cassandra’s fate; it appears that she was no longer employed by Lindoo at the time of the meeting.

Bill to be referring to their agreement. According to Susan, while she was packing her personal belongings, Rhonda told her that she and Bill had “changed [their] minds” and were not “living up to” their agreement.

¶ 14 Susan testified that she “enjoyed [her] job at Lindoo up until the day [she] was fired.” She elaborated that she would not have thought about leaving even if she had not been promised business ownership. On May 3, 2010, Susan obtained employment as an executive assistant for an annual salary of \$51,000. One month after being terminated, Chris was hired as a mortgage underwriter (his previous line of work) at PNC Bank making \$70,700 per year.

¶ 15 On July 29, 2010, plaintiffs filed a verified complaint, which they subsequently amended. Plaintiffs alleged intentional misrepresentation/fraud (count I), promissory estoppel (count II), and breach of oral contract (count III). Defendants ultimately filed a motion for summary judgment. While that was pending, plaintiffs filed a second amended verified complaint, identical to the prior complaint, but adding a fourth count for spoliation of evidence. The trial court granted defendants’ motion for summary judgment on all three counts of the first amended complaint. Thereafter, defendants filed a motion for summary judgment on the spoliation of evidence claim, which the trial court granted.² Plaintiffs timely appeal.

¶ 16

II. ANALYSIS

¶ 17 Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file, when viewed in the light most favorable to the nonmoving party, show that

² Defendants’ motion was entitled a motion for summary judgment; however, the attached document was entitled a memorandum in support of a section 2-619 (735 ILCS 5/2-619 (West 2012)) motion to dismiss. The court’s order recited that it granted summary judgment in defendants’ favor but that it denied defendants’ 2-619 motion to dismiss.

there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012); *Pekin Insurance Co. v. Precision Dose, Inc.*, 2012 IL App (2d) 110195, ¶ 28. The trial court’s sole function is to determine whether a question of material fact exists, not to resolve the issue. *Mills v. McDuffa*, 393 Ill. App. 3d 940, 948 (2009). Although summary judgment may aid in the expeditious disposition of a lawsuit, it is a “drastic means of disposing of litigation and should not be granted unless the movant’s right to judgment is clear and free from doubt.” *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 28. We review summary judgment rulings *de novo*.³ *Pekin Insurance Co.*, 2012 IL App (2d) 110195, ¶ 29.

¶ 18 A. Intentional Misrepresentation/Fraud

¶ 19 In order to prove fraudulent misrepresentation,⁴ a plaintiff must show “(1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance.” *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008). Generally, the false statement must be about a past or present fact and not merely a promise to do something in the future. *Commonwealth Eastern Mortgage Co. v. Williams*, 163 Ill. App. 3d 103, 113 (1987). However, there is an exception if the “false promise or representation of future conduct is alleged to be the scheme employed to accomplish

³ We note that plaintiffs did not include in the record on appeal any reports of proceedings. Regardless, we review the trial court’s judgment, not its reasoning. *Forsberg v. Edward Hospital & Health Services*, 389 Ill. App. 3d 434, 440 (2009).

⁴ Although plaintiffs labeled their first count as “intentional misrepresentation/fraud,” they cite the rule from cases discussing fraudulent misrepresentation.

the fraud.’ ” *Commonwealth Eastern Mortgage*, 163 Ill. App. 3d at 113 (quoting *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 334 (1977)); *Willis v. Atkins*, 412 Ill. 245, 260 (1952) (describing the exception as a false promise or representation of future conduct that is the “scheme or devise used to accomplish the fraud and cheat another of his property”). To qualify for the exception, a plaintiff must allege sufficient facts from which a scheme can be inferred. *Commonwealth Eastern Mortgage*, 163 Ill. App. 3d at 114.

¶ 20 Plaintiffs assert that Bill made a false statement of material fact when he told plaintiffs (and Lindoo employees and customers) that he was going to transfer the business to plaintiffs and that they would be the owners. This statement was, at most, a promise to do something in the future. Plaintiffs alleged in their complaint that Bill’s plan and scheme was to keep the plaintiffs in Lindoo’s employ. In their brief on appeal, plaintiffs contend that Bill had previously engaged in a similar scheme with a person named Doug Friedman. In her deposition, Susan testified that Bill told her that he previously hired Friedman under the pretense of growing the business to gain some type of ownership. Plaintiffs do not elaborate on the alleged scheme beyond stating that Bill’s scheme was to keep them in Lindoo’s employment. Susan testified that she loved her job. She specifically said that she had not continued her employment based on Bill’s alleged misrepresentations. Susan agreed that “even if [she] weren’t promised ownership of the company, [she] would not have been thinking about leaving Lindoo.” Chris testified that he was unemployed when he agreed to work for Lindoo. Despite plaintiffs’ assertion that a portion of their salaries was to go toward accruing equity in the business, plaintiffs admitted that no definite percentage or amount was ever agreed upon. They offered no evidence that they worked for reduced salaries. There is simply no evidence that Bill’s alleged misrepresentation was a scheme to defraud plaintiffs of anything. *Cf. Willis v. Atkins*, 412 Ill. at 259-61

(concluding that the plaintiff had established fraudulent misrepresentation where the defendant obtained real estate from the plaintiff by promising to marry her). On this record, plaintiffs failed to demonstrate a genuine issue of material fact as to the first element of fraudulent misrepresentation. Accordingly, the trial court properly entered summary judgment on count I in defendants' favor. See *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008) (“If the plaintiff fails to establish any element of the cause of action, summary judgment for the defendant is proper.”).

¶ 21

B. Promissory Estoppel

¶ 22 The elements of a promissory estoppel claim are (1) the defendant's unambiguous promise to the plaintiff, (2) the plaintiff's reliance on the promise, (3) the plaintiff's reliance was expected and foreseeable by the defendants, and (4) the plaintiff's reliance was detrimental to it. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 86.

¶ 23 Plaintiffs failed to raise a genuine issue of material fact as to the fourth element of promissory estoppel—detrimental reliance. Other than their conclusory allegation in their brief that they detrimentally relied on Bill's statement about transferring ownership of the business, plaintiffs fail even to hint at any reliance on their part, let alone any detriment. At oral argument, plaintiffs asserted that they relied on Bill's statement by working at Lindoo. However, plaintiffs admitted that they were compensated for their work and that they paid nothing toward the purchase of the business. Moreover, plaintiffs' deposition testimony completely undermines the element of detrimental reliance. Susan testified that she loved her job and would not have considered leaving even absent Bill's alleged statements.⁵ Chris was unemployed when he

⁵ Susan's deposition testimony also directly contradicted paragraph 22 of count II (promissory estoppel) of plaintiffs' amended verified complaint, which alleged, “Had [plaintiffs] not relied upon the conduct and representations made by [Bill], they would have resigned the

accepted Bill's offer of employment. Plaintiffs make no argument that either of them forewent other employment opportunities in reliance on Bill's alleged promise. Accordingly, the trial court properly granted summary judgment in defendants' favor on count II.

¶ 24 C. Breach of Oral Contract

¶ 25 A breach of contract claim includes four elements: (1) the existence of a contract, (2) the plaintiff's performance under the contract, (3) the defendant's breach of the contract, and (4) damages. *Anderson v. Kohler*, 397 Ill. App. 3d 773, 785 (2009). An oral contract is not enforceable unless its terms are "sufficiently definite and certain." *Commonwealth Eastern Mortgage*, 163 Ill. App. 3d at 110. In other words, in order for a contract to be enforceable, the court must be able to determine what the parties have agreed to do. *Rose v. Mavrakis*, 343 Ill. App. 3d 1086, 1091 (2003).

¶ 26 Plaintiffs contend that they had a contract with defendants wherein defendants would transfer ownership of Lindoo to plaintiffs. Plaintiffs testified that they talked with Bill about a two to three-year transition period during which equity from their salaries would be applied to the purchase price, as would Bill's taking of profits; at the end of the period, plaintiffs would owe Bill some lump sum. Nowhere did plaintiffs provide any evidence, or even an allegation, as to an agreement on how the equity or profits would be calculated, a definite time frame, or the total purchase price. Indeed, plaintiffs acknowledged in their depositions that the parties never reached any agreement on the terms. On this record, plaintiffs' contract claim fails for lack of definite and certain terms. Even assuming the parties agreed to do something, there is no way for the court to determine exactly what that something was. Accordingly, the trial court properly granted summary judgment in defendants' favor on count III.

employ of [Lindoo] prior to their termination."

¶ 27

D. Spoliation of Evidence

¶ 28 Plaintiffs argue that they exchanged emails with defendants in which they discussed their agreement regarding transfer of ownership. Plaintiffs assert that the emails were exchanged on Lindoo computers and that defendants affirmatively destroyed the emails. Plaintiffs further maintain that defendants' destruction of the emails deprived them of evidence necessary to prove their underlying claims.

¶ 29 A spoliation of evidence claim is a species of negligence. *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 192-93 (1995). The elements of a negligence cause of action are a duty owed to the plaintiff by the defendant, defendant's breach of the duty, injury proximately caused by the breach, and damages. *Boyd*, 166 Ill. 2d at 194-95. In a negligent spoliation of evidence claim, the plaintiff must show that the "loss or destruction of the evidence caused the plaintiff to be unable to prove an underlying lawsuit." (Emphasis omitted.) *Boyd*, 166 Ill. 2d at 196.

¶ 30 Plaintiffs' negligent spoliation claim fails because they do not raise a genuine issue of material fact as to causation. As our foregoing discussion makes clear, plaintiffs' claims failed because they did not demonstrate a genuine issue of material fact as to any definite statement or offer by defendants or as to their detrimental reliance on any promise by defendants. In their depositions, plaintiffs testified that they sent emails to Bill requesting that he provide the specifics of the agreement. Notably, plaintiffs do not allege that the emails contained definite and certain terms or any additional facts at all. They merely assert that the emails "symboliz[ed] the agreement between the parties."⁶ Because the emails did not contain any information other

⁶ Plaintiffs also argue the emails would satisfy the statute of frauds (740 ILCS 80/1 (West 2012)). Given our conclusion that plaintiffs' contract claim failed on the merits for lack of definite terms, we did not address the parties' arguments regarding the statute of frauds.

than that to which plaintiffs testified, at most, the emails corroborated their testimony. Since plaintiffs' underlying claims failed for lack of definite and certain terms, the emails could not have helped plaintiffs prove their claims. Thus, defendants' alleged destruction of the emails did not render plaintiffs unable to prove their claims. Accordingly, the trial court properly granted summary judgment in defendants' favor on count IV.

¶ 31

III. CONCLUSION

¶ 32 For the reasons stated, the judgments of the circuit court of Kane County are affirmed.

¶ 33 Affirmed.