

No. 1-14-2366

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|----------------------|---|------------------|
| EVANGELINE CADIZ, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 10 L 229 |
| |) | |
| CLEOFÉ G. MAIBENCO, |) | Honorable |
| |) | John C. Griffin, |
| Defendant-Appellant, |) | Judge Presiding. |

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *HELD:* Judgment in favor of plaintiff on her breach of contract claims affirmed where: (1) the evidence at trial established that defendant failed to fulfill her repayment obligations under the oral loan agreements, and (2) the court did not err in rejecting defendant's affirmative defense that the statute of limitations barred plaintiff's claims.

¶ 2 Plaintiff, Evangeline Cadiz, filed a breach of contract action against defendant, Cleofe Maibenco, to recover money due on four alleged oral loans. The circuit court dismissed two of her claims pursuant to section 2-619(a)(5) of the Code of Civil Procedure (Code) (735 ILCS 5/2-

619(a)(5) (West 2012)), and allowed the remaining claims to go to trial. Following a bench trial, the court found that Cadiz had loaned Maibenco the sums of \$40,000 and \$20,000; that Maibenco had failed to repay those sums within five years as the parties had agreed; and that the statute of limitations did not bar Cadiz's claims. The court imposed judgment against Maibenco in the aggregate amount of \$60,000. On appeal, Maibenco contends that the court erred in finding: (1) that the payments to her constituted loans to be repaid within a five-year period; and (2) that the statute of limitations did not bar Cadiz's claims. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4

A. The Pleadings

¶ 5 On January 8, 2010, Cadiz filed a four-count verified complaint against Maibenco, alleging the breach of several verbal loan agreements. These included a \$40,000 loan in November 2000 (Count I); a \$20,241.92 loan in August 2000 (Count II); a \$13,000 loan in May 2004 (Count III); and a \$5,000 loan in May 2004 (Count IV). According to Cadiz, the parties had agreed that each of these sums would be repaid with interest within a five-year period. Maibenco, however, only made a few small payments and failed to repay the loans in full as of the time they were due.

¶ 6 On March 5, 2010, Maibenco filed a motion to dismiss the verified complaint pursuant to section 2-619(a)(5) of the Code, asserting that Cadiz's claims were barred by the five-year statute of limitations applicable to oral contracts. On January 4, 2011, the court denied Maibenco's motion, but noted that its denial was "without prejudice to refile upon completion of discovery."

¶ 7 On March 28, 2011, Maibenco tendered her answer and affirmative defenses. As her first affirmative defense, she asserted that she and Cadiz had been partners in a "joint adventure" in which they pooled their financial resources together and shared equally in gambling winnings

and losses. As her second affirmative defense, Maibenco asserted that Cadiz's claims were barred by the five-year statute of limitations applicable to oral contracts.¹

¶ 8 Subsequently, on March 15, 2013, Maibenco "renewed" her earlier motion to dismiss, asserting the statute of limitations as a bar to Cadiz's claims. On September 5, 2013, the court granted her motion in part and denied it in part, dismissing Counts III and IV, but allowing Counts I and II to go forward.² Thereafter, the case was reassigned to a different judge.

¶ 9 B. Trial Proceedings

¶ 10 A trial was held on Counts I and II of the verified complaint on May 20, 2014. The following testimony has been presented to us by way of a bystander's report.

¶ 11 1. Evangeline Cadiz

¶ 12 Evangeline Cadiz testified that she is a 71-year-old retired nurse living in Chicago. She became friends with Maibenco while working as a registered nurse at Bethany Hospital in 1997. The two would occasionally eat together after work and, between 1998 to 2001, they went to casinos about five or six times together. Cadiz denied that she ever participated in a joint venture with Maibenco wherein they pooled their money together for gambling.

¶ 13 Cadiz testified that, in August 2000, she loaned Maibenco \$20,241.92 for her business. She testified that she borrowed the principal from her 401(k) account and that Maibenco promised to assume her loan payments and to repay the loan within five years. Maibenco never made any payments on the loan, despite promising to do so on several occasions. Cadiz testified that she and Maibenco did not memorialize their agreement in writing. She also testified that she

¹ We note that Maibenco has not pleaded the statute of frauds as an affirmative defense to enforcement of the subject loan agreements. Under the circumstances, we find that she has waived the defense. *Harvey v. McKinney*, 221 Ill. App. 3d 140, 142 (1991).

² The court did not state the basis for its ruling, and the transcript of the hearing for that date is not in the record on appeal.

eventually paid off her 401(k) account loan with her own money five years later. At trial, Cadiz introduced loan documents showing that she borrowed \$20,241.92 from her retirement account on August 28, 2000.

¶ 14 Cadiz testified that, in November 2000, Maibenco began calling her "day and night" for another loan of \$40,000, claiming that her nursing agency, Alta Vista, was in need of money. Cadiz agreed to loan the money and took out a home equity loan with LaSalle National Bank (now Bank of America). The home equity loan had a maturity date of 10 years (December 2010). She introduced bank statements reflecting the existence of the loan. Cadiz testified that she signed the back of the loan check and gave it to Maibenco without requiring Maibenco to first memorialize their loan agreement and repayment obligations. According to Cadiz, Maibenco was supposed to pay off the loan in five years by making monthly payments directly to the bank, but she never did so. Cadiz testified that, in 2001 and 2002, both she and Maibenco made payments on the loan; then, from 2003 to 2009, Maibenco made some payments; and finally, she, Cadiz, made all of the remaining payments. Cadiz testified that Maibenco's checks occasionally bounced and that, several times, she called Maibenco and went to her office to request payment. Maibenco eventually told her to stop coming to her office and threatened to get a restraining order. Thereafter, Cadiz filed a lawsuit against Maibenco.

¶ 15 On cross-examination, Cadiz was impeached on the subject of when Maibenco stopped making payments on the \$40,000 loan. After being confronted with her deposition testimony, she acknowledged that Maibenco had stopped making payments on the \$40,000 loan in May 2003, not in 2009, as she had testified. Cadiz denied that she had ever asked Maibenco to hold money for her during the years 2000 to 2002. Furthermore, she could not recall whether, during that

time, Maibenco had given her money for gambling when they went to the casinos together. Cadiz acknowledged that she never made any written demands for payment of the loans.

¶ 16 2. Cleofe Maibenco (as an adverse witness)

¶ 17 Plaintiff's counsel called Maibenco as an adverse witness. Maibenco testified that she is currently the director of nursing at Global Home Health, a licensed home health care agency. She testified that she is a part-owner of the company with a 60% interest and that she is currently buying another 35% interest from Perla Wiszowaty. She acknowledged that Wiszowaty is suing her for the money that she invested in the business.

¶ 18 From 2000 to 2006, Maibenco and her husband owned Alta Vista Health Care. The company employed six nurses, one of whom was Faith Madera. Maibenco testified that the company paid Madera for all of her services, but she acknowledged that some payments were delayed. She testified that Alta Vista eventually closed because federal and state reimbursements were either delayed or were never made. Maibenco and her husband had invested \$400,000 in the company, some of which was money given, but not loaned, by the family of Maibenco's first husband. Maibenco acknowledged receiving over \$500,000 from friends and family for her business, but testified that these funds were not in the nature of loans.

¶ 19 Maibenco testified that she began gambling at casinos in 1998 and stopped in 2003 after she married. Between 1993 and 2003,³ she lost about \$500,000 gambling, with losses ranging from \$2,000 to \$5,000 per night. During the years 1998 to 2000, Maibenco would go to the casino five to six days per week. She testified that Cadiz would join her and that Cadiz gambled \$6,000 to \$10,000 per month. According to Maibenco, she knew Cadiz's gambling habits because Cadiz would have her gambling receipts sent to Maibenco's home. Faith Madera

³ The bystander's report states the year 1993. We believe this may be a clerical error given that Maibenco testified that she began gambling in 1998.

accompanied Cadiz and her to the casinos on six or seven occasions, but neither she nor anyone else knew that Cadiz and Maibenco were going to the casinos nearly every day.

¶ 20 Maibenco testified that, in 1998, she and Cadiz entered into an oral agreement to pool their money together for gambling. At the time, they were both experienced nurses earning between \$75,000 to \$90,000 per year. Each of them usually gambled the same amount of money; Maibenco would bet on blackjack and Cadiz would play the slot machines. At times, they won a lot of money. Sometimes Maibenco would give Cadiz money, and other times, Cadiz would give Maibenco money; they did not keep track of these transactions. She and Cadiz never had a written agreement because they "were all living in sin." This "joint venture" eventually ended in 2003 when Maibenco stopped going to casinos.

¶ 21 Maibenco testified that she received \$20,000 from Cadiz in August 2000, but denied that it was a loan. She testified that all of the money was gambled away. Maibenco acknowledged receiving \$40,000 from Cadiz three months later, in November 2000, as well. She testified that this money was not a loan either and that she gave it back to Cadiz for gambling. Maibenco testified that she helped out Cadiz by making \$200 payments on her home equity loan through early 2003. Thereafter, she made sporadic payments on the loan until 2008, but her checks bounced. Maibenco denied that she ever threatened Cadiz with a restraining order.

¶ 22 3. Faith Madera

¶ 23 Faith Madera testified that she is a registered nurse and a close friend of Cadiz from Bethany Hospital, where they both previously worked. Madera testified that, in 1998, she and Cadiz would go out to dinner after work and also, occasionally, go to the casinos. For about three years, Madera worked for Maibenco's nursing agency, Alta Vista. She testified that she was not

always paid on time while working for the company, in particular during the years 2000 to 2001. She stated that she was still owed \$3,000 at the time she left her employment.

¶ 24 While she was employed at Alta Vista, Madera would occasionally go to the casinos. She testified that Cadiz would go daily, but less than five days per week. Madera recalled loaning Maibenco almost \$19,000 when they were at the casinos together. Maibenco initially started to repay Madera, but eventually stopped and, ultimately, never paid back the entire amount that she owed. On cross-examination, Madera stated that the \$19,000 she loaned to Maibenco had been lost during gambling. She acknowledged that she never asked Maibenco to memorialize any loans in writing and that she never made any written demands for payment of the loans.

¶ 25 4. Perla Wiszowaty

¶ 26 Perla Wiszowaty testified that she is a registered nurse and the owner of a home health care service. She testified that she was previously the manager of the intensive care unit at Bethany Hospital, where she worked with both Madera and Maibenco. Wiszowaty had a social friendship with Cadiz, but not with Maibenco, who worked under her. She testified that she did not know if Cadiz was a gambler, but that she knew Maibenco was one. She testified that, one time, she gave \$6,000 to the church so that Maibenco and her husband, a doctor, could go to Africa to help people. According to her, Maibenco promised to repay the money to her, but then never did. At the close of Wiszowaty's testimony, Cadiz rested her case.

¶ 27 5. Cleofe Maibenco

¶ 28 Maibenco testified in support of her own case in defense of the claims. She denied borrowing money from Cadiz. Instead, Maibenco explained, Cadiz had given her the money from her 401(k) to hold because Cadiz was afraid that her own husband would discover that she had borrowed money to gamble. According to Maibenco, Cadiz was also saving money to visit

her boyfriend in Washington and did not want her husband to find out. Maibenco recalled that, from 2000 to 2001, Cadiz would give her about \$5,000 cash at a time to hold. Maibenco estimated that the total amount that Cadiz had asked her to hold was "probably" more than \$60,000 in total. Over time, Maibenco gave the money back to Cadiz, at her request, while they were gambling at casinos.

¶ 29 Maibenco testified that, from 1999 to 2000, she and Cadiz agreed to share their gambling profits and losses together and that they never kept any written accounting of the losses, which apparently far exceeded their profits. When the court asked Maibenco if she had received funds totaling \$60,000 from Cadiz, Maibenco answered "yes." Maibenco stated that she had given the money back to Cadiz, but did not have any written receipts of those payments.

¶ 30 C. The Court's Findings

¶ 31 Following closing argument, the court noted its reservations about the credibility of both parties. Nonetheless, it found that: (1) Cadiz met her burden of proving that she gave Maibenco money in the sums of \$20,000 and \$40,000; (2) the parties' agreement for Maibenco to repay these loans within five years was not unreasonable; (3) Maibenco failed to meet her burden of showing repayment; (4) all inferences pointed to the parties' transactions as being loans; (5) the evidence did not support an award of interest on the loans or an award of attorney's fees; and (6) the statute of limitations had not run on Cadiz's claims. On March 21, 2014, the court entered judgment in favor of Cadiz and against Maibenco in the aggregate amount of \$60,000.

¶ 32 On April 18, 2014, Maibenco filed a motion to modify or vacate the judgment. She asserted that the court's finding that Cadiz had proven the existence of the subject loans was against the manifest weight of the evidence and that Cadiz's claims were barred by the statute of limitations. On July 2, 2014, the court denied Maibenco's motion.

¶ 33 Maibenco timely appealed the court's judgment of March 21, 2014. We have jurisdiction pursuant to Illinois Supreme Court Rules 301 (eff. Feb. 1, 1994) and 303 (eff. May 30, 2008).

¶ 34 ANALYSIS

¶ 35 On appeal, Maibenco contends that the court erred in finding: (1) that Cadiz loaned her the sums of \$20,000 and \$40,000, with an agreement that such sums be repaid in installments within a five-year period; and (2) that Cadiz's claims were not barred by the five-year statute of limitations applicable to oral contracts. We address each of these arguments in turn.

¶ 36 Before doing so, however, we must note that Cadiz has failed to comply with the supreme court rules governing appellate briefs. In her argument section, Cadiz has failed to cite to the pages of the record, as required. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). This court has the authority to strike a brief for failure to comply with the Illinois supreme court rules governing appellate briefs. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 10. While we have decided not to impose the harsh sanction of striking Cadiz's brief here, we admonish her counsel to carefully heed the rules in the future. With that, we turn to the issues presented.

¶ 37 A. Existence of Loan Agreements

¶ 38 Maibenco claims that Cadiz failed to meet her burden of proving a valid oral loan agreement with respect to each of the subject loans. She argues that Cadiz failed to submit evidence of "where, when and how" the \$20,000 and \$40,000 payments were made; of the frequency and amounts of the installments due on the alleged loans; of the amount of interest due on the loans; of any written demands for payment made by Cadiz; or of any agreement regarding attorney's fees. She maintains that the essential elements of the parties' agreement were not established by the evidence and that the court erred by supplying the missing terms. Cadiz, in response, contends that the court's finding was not against the manifest weight of the evidence.

¶ 39 To prove a claim of breach of contract, a plaintiff must establish a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and resulting damages or injury to the plaintiff. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 68. Here, only the first element is at issue: namely, the existence of a valid and enforceable contract.

¶ 40 An oral agreement is binding where there is an offer, an acceptance, and a meeting of the minds as to the terms of the agreement. *Bruzas v. Richardson*, 408 Ill. App. 3d 98, 105 (2011). To be enforceable, the material terms of a contract must be definite and certain. *Id.* A contract's terms are definite and certain if the court is able to ascertain the parties' agreement applying proper rules of construction and applicable principles of equity. *Id.* The question of whether a contract existed, the parties' intent in forming it, and its terms are factual questions for the trier of fact. *Prignano v. Prignano*, 405 Ill. App. 3d 801, 810 (2010). We will only reverse the findings of a trial court after a bench trial if they are against the manifest weight of the evidence, *i.e.*, the opposite conclusion is apparent or the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 41.

¶ 41 Here, the undisputed evidence shows that Cadiz made two payments to Maibenco: (1) a payment of \$20,000 in August 2000, and (2) a payment of \$40,000 in November 2000. The primary issue at trial was whether these payments constituted loans. According to Cadiz, these payments were, indeed, loans. She testified that both payments were given to Maibenco to support her business and that the principal was obtained by borrowing from her 401(k) account and by taking out a home equity loan. She testified that Maibenco agreed to repay the loans by making payments directly to the banks from which the funds were obtained, over the course of a five-year period. Through her testimony, Cadiz clearly established each of the essential terms of

a promise to pay, including: (1) the parties to the agreement, (2) the nature of the transaction, (3) the amount in question, and (4) at least a reasonable implication of an intention to repay the debt. *Kranzler v. Saltzman*, 407 Ill. App. 3d 24, 28 (2011). Under the circumstances, we cannot say that the court's finding—that the parties' had entered into two valid oral loan agreements—was unreasonable, arbitrary, or not based on the evidence.

¶ 42 Maibenco argues that there was insufficient evidence to establish the necessary terms of the two loan agreements. She cites a number of facts that were allegedly not established at trial, but fails to explain why the absence of these facts is of any relevance. She claims that there was no evidence of "where, when and how" the \$20,000 and \$40,000 payments were made. It was uncontested at trial, however, that Maibenco received these funds. We thus fail to see what purpose these facts would serve, and Maibenco, herself, has not explained their relevance.⁴ Maibenco points out that there was also no evidence of the frequency and amounts of the installments due on the loans, the interest rate, or the parties' agreement regarding attorney's fees. Again, we fail to see how these facts are relevant. Cadiz's testimony established that Maibenco did not pay the subject loans within five years, as required; therefore, she was in default regardless of the frequency and amount of any monthly installments. Furthermore, the trial court did not award interest or attorney's fees, so its findings properly reflect that there was no evidence on either of these subjects. *See id.* at 29-30 (rejecting the argument that the rate of interest is an essential term of a loan agreement). Ultimately, we find no merit to Maibenco's claim that the parties' loan agreements were invalid in the absence of the foregoing facts.

¶ 43 Maibenco appears to challenge the court's determination that the subject payments constituted loans, as opposed to funds that the parties shared in a gambling "joint venture." She

⁴ Contrary to Maibenco's claim, there was evidence of how Cadiz turned over the \$40,000 to Maibenco. Cadiz testified that she gave her an indorsed loan check.

points out that there was no evidence that Cadiz made any written demands for payment and that the evidence established that Cadiz paid off the loans herself. She also directs us to her own testimony that the parties agreed to pool their money together for gambling purposes and that she was helping Cadiz hide money from her husband.

¶ 44 While the trial court found that both parties had credibility issues, it determined that all signs pointed to the subject payments being loans, as opposed to funds contributed to a joint gambling venture. In a bench trial, the trial court sits as the trier of fact and is in the best position to make credibility determinations and factual findings. *Prignano*, 405 Ill. App. 3d at 810. We will not reweigh the evidence or second-guess the court's credibility determinations. *Id.*

¶ 45 Here, the evidence showed that, at the time of the subject payments, Maibenco was in debt and afflicted with a gambling addiction. She was struggling to make timely payments to employees, such as Faith Madera, and had just sustained \$500,000 in gambling losses. She had also borrowed money from Madera to feed her gambling addiction. We agree that all of the inferences suggest that Cadiz's payments to Maibenco were loans to keep her struggling business afloat or even perhaps to support her gambling habit. Accordingly, we conclude that the court's findings were not against the manifest weight of the evidence. See *Sheth*, 2013 IL App (1st) 110156, ¶ 41.

¶ 46 B. Statute of Limitations

¶ 47 Maibenco next contends that the court erred in finding that Cadiz's breach of contract claims (Counts I and II) were not barred by the five-year statute of limitations applicable to oral contracts.⁵ Actions on unwritten contracts must be commenced within five years of a cause of action accruing. 735 ILCS 5/13-205 (West 2012). In a breach of contract action, the cause of

⁵ We note that Maibenco has not appealed the court's ruling on her motion to dismiss. Instead, she appeals the court's ruling on her affirmative defense that Cadiz's claims were barred by the statute of limitations.

action accrues at the time of the breach of contract, not when a party sustains damages. *Hermitage Corp. v. Contractors Adjustment Co.*, 166 Ill. 2d 72, 77 (1995). We review *de novo* the legal question of whether a statute of limitations applies to bar a cause of action. *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 466 (2008).

¶ 48 Maibenco argues that the limitations period began running on the \$40,000 loan in May 2004 and on the \$20,000 loan in September 2006. She does not explain the significance of the May 2004 date, other than noting that payments on the \$40,000 loan ceased to be made as of April 2003. With respect to the September 2006 date, Maibenco claims that this was the due date of the first installment payment on the \$20,000 loan. Since she never attempted to repay this loan, she claims that this was the date of the breach.

¶ 49 Cadiz argues that she was entitled to wait until the final deadline for repayment of the loans before determining that a breach had occurred. She claims that the limitation period began running in December 2005 for the \$40,000 loan and in September 2005 for the \$20,000 loan. Because she filed her complaint on January 8, 2010, Cadiz argues that her claims were not barred by the five-year statute of limitations.

¶ 50 The dispositive issue here is the date of the breaches. This court has noted that "[a] cause of action accrues and the statute of limitations begins to run when a creditor may legally demand payment from a debtor." *Kozasa v. Guardian Electric Manufacturing Co.*, 99 Ill. App. 3d 669, 673 (1981). Here, the court found that the terms of the subject loans required repayment within five years. Since the first loan of \$40,000 was made in August 2000 and the second loan of \$20,000 was made in November 2000, we find that the statute of limitations began running in August 2005 and November 2005, respectively. Cadiz filed her complaint on January 8, 2010,

within five years of these alleged breaches. We therefore find that the court did not err in ruling that the statute of limitations had not run with respect to her claims.

¶ 51 We reject Maibenco's attempt to set the dates of the breaches in relation to alleged unpaid installment payments. In this case, the court did not make any finding that the subject loans had to be repaid in installments. Maibenco thus cannot rely on this fact in support of her statute of limitations affirmative defense. See *Goldman v. Walco Tool & Engineering Co.*, 243 Ill. App. 3d 981, 989 (1993) (noting that "[t]he statute of limitations is an affirmative defense which must be pleaded and proved by a defendant").

¶ 52 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 53 Affirmed.