

NOTICE

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2015 IL App (4th) 140457-U

NO. 4-14-0457

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 24, 2015
Carla Bender
4th District Appellate
Court, IL

DAVID KAY ELDRIDGE; EILEEN ELDRIDGE; RAY)	Appeal from
ELDRIDGE, JR.; TIMOTHY M. DOWD; EXECUTIVE)	Circuit Court of
DEVELOPMENT COMPANY; and DOWD)	Macon County
DEVELOPMENT COMPANY, INC.,)	No. 08L27
Plaintiffs-Appellants,)	
v.)	
PROEMP, INC.; RICHARD B. TARRO; and SLEEPER,)	Honorable
DISBROW, MORRISON, TARRO & LIVELY, LLC,)	Thomas E. Little,
Defendants-Appellees.)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing plaintiffs' respective claims against defendants.

¶ 2 On April 16, 2009, the trial court entered a written order, dismissing counts I and II of plaintiffs', David Kay Eldridge, Eileen Eldridge, Ray Eldridge, Jr., Timothy M. Dowd, Executive Development Company (Executive Development), and Dowd Development Company, Inc. (Dowd Development), second amended complaint against defendant ProEmp, Inc. (ProEmp). On November 25, 2013, the court dismissed counts III through VI of plaintiffs' third amended complaint against defendants Richard B. Tarro and Sleeper, Disbrow, Morrison, Tarro & Lively, LLC (Sleeper). Plaintiffs appeal pursuant to a Rule 304(a) (Ill. S. Ct. R. 304(a) (eff. Jan. 1, 2006)) finding, arguing the court erred in dismissing their respective claims against ProEmp, Tarro, and Sleeper. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In February 2008, plaintiffs filed their complaint against ProEmp, Tarro, and Sleeper. This case stems from Jennifer Campbell allegedly writing fraudulent checks from checking accounts she had access to in the course of her employment at Dowd Development. Campbell was hired through an "employee leasing company," ProEmp. On July 3, 2008, the trial court granted plaintiffs leave of court to file an amended complaint.

¶ 5 In August 2008, plaintiffs filed their first amended complaint, once again naming ProEmp, Tarro, and Sleeper as defendants. On September 10, 2008, ProEmp filed a motion to dismiss counts I and II of plaintiffs' first amended complaint. On November 21, 2008, the trial court dismissed without prejudice counts I and II.

¶ 6 In January 2009, Dowd Development filed a second amended complaint against ProEmp. This complaint amended the first two counts against ProEmp, which had previously been dismissed. According to the complaint, Dowd Development and ProEmp entered into a service agreement on November 30, 1995, whereby ProEmp would "provide contract personnel services (employee leasing)" for Dowd Development and charge Dowd Development a "Service Fee," which was a percentage of the employees' gross earnings.

¶ 7 Timothy M. Dowd was the sole owner of Dowd Development. Dowd Development was the leasing agent for plaintiffs David and Eileen Eldridge, Ray Eldridge, Jr., and Dowd's Hickory Point Plaza property and Executive Development. Pursuant to the agreement between ProEmp and Dowd Development, Campbell began working at Dowd Development in 1997.

¶ 8 Section IV of the agreement between ProEmp and Dowd Development provided, in part:

"E. [ProEmp] agrees to release, defend, indemnify, and hold [Dowd Development] harmless from any and all wrongful or negligent acts of [ProEmp], or any failure of [ProEmp] to act in performance of its duties during the term of this Agreement."

Section V of the agreement provided, in part:

"A. [Dowd Development] will be responsible for supervision and direction of employees. [Dowd Development] will verify skills and references to determine employee eligibility of all employees.

* * *

F. If employees are required, in the course of their duties, to deal with confidential information, cash or any high value item, [Dowd Development] will institute procedures to safeguard such items. It shall be the sole responsibility of [Dowd Development] and not of [ProEmp] to protect such valuables.

* * *

L. [Dowd Development] agrees to release, defend, indemnify and hold [ProEmp] harmless from any and all wrongful or negligent acts committed by [Dowd Development] or employees under [Dowd Development's] supervision including violations of federal, state or local laws or regulations."

Dowd Development alleged the agreement was modified by an addendum dated January 1, 1996, which stated:

"For purposes of State Unemployment (CH IV. Sec 2732.305, Illinois Administrative Code), [ProEmp] will act as sole authority on functions related to contract personnel services including employee hiring, salary administration, promotion, discipline, assignment/re-assignment, termination, conditions of work, and on-site supervision.

Notwithstanding any of the aforementioned functions, nothing herein shall limit the right of [ProEmp] to confer with [Dowd Development] concerning any of the aforementioned functions."

¶ 9 Campbell's duties at Dowd Development included (1) posting entries on the checkbook register and preparing checks from accounts managed by Dowd Development for Hickory Point Plaza and Executive Development for signature by Dowd; (2) entering data into the computerized check register for Hickory Point Plaza and Executive Development; (3) transmitting financial information to Tarro and Sleeper as requested by them for preparation of tax returns and accounting; and (4) interacting with Tarro and Sleeper concerning financial information transmitted to them. Campbell worked at Dowd Development until January 2, 2005.

¶ 10 Plaintiffs allege, beginning in July 1997 and continuing throughout her entire time working at Dowd Development, Campbell "began a course of conduct wherein she wrote checks upon the accounts of Hickory Point Plaza and [Executive Development] payable unto herself, payable unto her personal financial institution, Target National Bank, and to other entities not authorized by the Plaintiffs," by forging Dowd's signature. Campbell wrote unauthorized checks totaling \$252,434.94 and \$704,739.09 from Executive Development's and Hickory Point Plaza's

checking accounts, respectively. On April 18, 2006, plaintiffs became aware of some of the withdrawals made by Campbell but did not know the full extent of her unauthorized activities until later.

¶ 11 In February 2009, ProEmp filed a motion to dismiss counts I and II of the second amended complaint. On March 31, 2009, the trial court granted ProEmp's motion to dismiss with prejudice and entered a written order on April 16, 2009. The court did not enter a Rule 304(a) finding at that time and claims were still pending against the other two defendants.

¶ 12 On January 25, 2010, plaintiffs filed their second amended complaint for counts III through XIV directed at Tarro and Sleeper. On February 18, 2010, Tarro and Sleeper moved to dismiss those counts. On April 16, 2013, two ancillary cases (Macon County case Nos. 2006-L-66 and 2008-L-138) were consolidated with this case. On April 26, 2013, the trial court dismissed without prejudice counts III through XIV of plaintiffs' second amended complaint, holding as follows:

1. The factual allegations of Plaintiffs' Second Amended Complaint fail to demonstrate the existence of a duty on the part of Defendants to detect and prevent forgery.

2. The factual allegations of Plaintiffs' Second Amended Complaint fail to allege a loss from the forgery that was proximately caused by the accounting services that Defendants provided to Plaintiffs.

3. The factual allegations of Plaintiffs' Second Amended Complaint suggest that Plaintiffs' losses from the forgery were not caused by any intended reliance by Plaintiffs on any

misrepresentations or omissions made by Defendants and those counts alleging common law fraud, statutory fraud, and negligent misrepresentation must therefore fail.

4. The Illinois Consumer Fraud and Deceptive Practices Act is intended to apply to transactions which affect consumers generally and is not available as an additional remedy to address a purely private wrong. The allegations in the Second Amended Complaint do not implicate consumer protection concerns."

¶ 13 On May 14, 2013, plaintiffs filed their third amended complaint with counts directed against Tarro and Sleeper for breach of contract and negligent misrepresentation. According to their complaint, plaintiffs hired Tarro prior to July 1997 pursuant to an oral contract to provide financial, accounting, and tax preparation services without limitation for a fee. Plaintiffs allege:

"[Tarro] agreed to provide financial, accounting and tax preparation services without limitation and further represented and agreed and/or implied covenants and warranties that the services would be performed in a proper, skillful, and careful manner with the ordinary care and diligence of a reasonably careful accountant and with the same degree of knowledge, skill and ability as an ordinarily careful accountant would exercise under similar circumstances."

Tarro's bills and statements, which were sent to plaintiffs, did not contain any itemization for services he or his employees rendered for plaintiffs.

¶ 14 Tarro instructed Dowd as to the items, records, and documents to be delivered to Tarro and Sleeper for preparation of tax returns and accounting for plaintiffs. Tarro told Dowd to use a computerized record-keeping program, which Dowd Development purchased and began using. One of Tarro's employees taught Campbell how to use the computer program for record keeping. Tarro instructed Dowd not to send bank statements, cancelled checks, and check stubs completed by hand and located in the checkbook to Tarro and Sleeper because Dowd Development was using the computerized record-keeping program. Dowd Development's long-standing practice for preparation of tax returns and for accounting had been to send the bank statements, cancelled checks, and check stubs to Tarro and Sleeper.

¶ 15 According to the complaint, the records prepared by Campbell, which were received and used by Tarro, his agents, and employees:

"reflected on their face information which a reasonably careful accountant would question among which are:

- (a) Listing check numbers not just on checks written but also on deposits into the checking account;
- (b) Multiple and repeated instances of skipping check numbers individually and in groups;
- (c) Reporting checks out of sequence;
- (d) Adjusting the balance in the check register record with no apparent reason;
- (e) Reflecting significantly less deposits for rents received than the amounts reported on the tax Form 1099s received from the tenants for each calendar year."

¶ 16 According to the complaint, after receiving his and his wife's 1999 state and federal income tax returns in 2000, David Eldridge noticed they were credited with more income than each of them had actually received from Hickory Point Plaza and Executive Development. As a result, they were paying far more income tax than they expected to pay.

¶ 17 David and Eileen Eldridge, Ray Eldridge, Jr., and Dowd discussed the situation. Thereafter, David and Dowd, each on behalf of himself and the others, asked Tarro why Hickory Point Plaza and Executive Development did not have the cash flow they expected the properties to be creating. Tarro said he would answer their inquiries after he investigated. Two to four weeks later, without asking for any additional information from plaintiffs, Tarro informed Eldridge and Dowd "that the reason [Hickory Point Plaza] and [Executive Development] did not have the cash flow [they] expected, was because the cash flow was being used to pay off the debt owed by [Hickory Point Plaza] and [Executive Development] early." This same inquiry and response occurred multiple times over the following years. According to their complaint, "The response provided by [Tarro] to the inquiries from [Eldridge and Dowd] that their debt was being paid early caused them to not investigate further." In November 2007, plaintiffs discovered the debt owed by Hickory Point Plaza and Executive Development was not being paid early as Tarro had stated.

¶ 18 Plaintiffs allege Tarro "failed to advise that there was a lack of substantiation in the records he reviewed, if any, as to why there was less cash flow than expected from Hickory Point Plaza and [Executive Development]." Further, plaintiffs alleged Tarro never told David or Dowd "he did not have enough information to determine why [Hickory Point Plaza] and/or [Executive Development] did not have the cash flow [they] expected them to be creating."

¶ 19 On June 14, 2013, Tarro and Sleeper filed a motion to dismiss counts III through VI of the third amended complaint. On November 25, 2013, the trial court dismissed with prejudice the claims against Tarro and Sleeper. On December 17, 2013, plaintiffs filed a motion to reconsider the dismissal of all of their claims, including the April 16, 2009, dismissal of counts I and II of the second amended complaint against ProEmp. In the alternative, plaintiffs moved for a Rule 304(a) finding so they could immediately appeal the dismissal of their claims.

¶ 20 On March 17, 2014, the trial court denied plaintiffs' motion for reconsideration but granted their motion for a Rule 304(a) finding, directing a written order be submitted. A written Rule 304(a) finding was entered on April 14, 2014. (The ancillary cases, previously consolidated with this case, remained pending and were stayed by the court until this appeal is resolved.)

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Plaintiffs appeal the trial court's decision to grant defendants' motions to dismiss. Our supreme court has stated: "When we review the granting of such a motion, we accept all well-pleaded facts as true, and we should affirm the trial court's judgment if our *de novo* review reveals that the allegations, when viewed in the light most favorable to the plaintiff, are insufficient to state a cause of action upon which relief may be granted." *A.P. Properties, Inc. v. Goshinsky*, 186 Ill. 2d 524, 527, 714 N.E.2d 519, 521 (1999).

¶ 24 A. Count I (Breach of Contract)—ProEmp

¶ 25 We first address Dowd Development's breach-of-contract claim against ProEmp. Plaintiffs argue ProEmp is responsible for Campbell's alleged theft based on an addendum to the

service-agreement contract between Dowd Development and ProEmp. The addendum, dated January 1, 1996, states:

"For the purposes of State Unemployment (CH IV. Sec 2732.305, Illinois Administrative Code), [ProEmp] will act as sole authority on functions related to contract personnel services including employee hiring, salary administration, promotion, discipline, assignment/re-assignment, termination, conditions of work, and on-site supervision."

Defendants argue, in part, the addendum is not a valid part of the contract. However, even assuming the addendum is a valid part of the agreement for purposes of this appeal, we still affirm the trial court's decision to dismiss the breach-of-contract claim against ProEmp.

¶ 26 Plaintiffs argue the addendum reflects the intent of the parties ProEmp was solely responsible for supervising Campbell and is therefore responsible for Campbell's alleged theft under the terms of the addendum. As a result, they contend the trial court erred in dismissing Dowd's breach-of-contract and negligence claims against ProEmp. According to plaintiffs, addendum A clearly states ProEmp has "sole authority" for "on-site supervision" of Campbell and the addendum must be given its plain meaning.

¶ 27 The trial court found the agreement made ProEmp the responsible employer for state unemployment purposes. This, however, did not mean ProEmp was responsible for Campbell's supervision for all purposes. Plaintiffs argue the court misinterpreted the contract between Dowd and ProEmp. According to plaintiffs, when the contract is interpreted correctly, "the sole and exclusive authority and responsibility for supervision of Jennifer Campbell rests with ProEmp just as the contract states on its face." Plaintiffs contend:

"Can one have 'sole authority' for 'functions related to contract personnel services including employee hiring, salary administration, promotion, discipline, assignment/re-assignment, termination, conditions of work, and on-site supervision' as agreed for state unemployment responsibility and not be responsible for 'on-site supervision' for any other matter?"

Based on the contract in this case, the answer to that question is "yes."

¶ 28 The construction of a contract is a question of law. *Jackson v. Hammer*, 274 Ill. App. 3d 59, 65, 653 N.E.2d 809, 814 (1995). In stating a claim for breach of contract, only a duty imposed by the terms of the contract can give rise to a breach. *Martin v. State Farm Mutual Automobile Insurance Co.*, 348 Ill. App. 3d 846, 853, 808 N.E.2d 47, 54 (2004). Neither the original contract nor the addendum to the contract imposed any duty on ProEmp to supervise Campbell's handling of valuables at Dowd Development. Instead the parties agreed Dowd Development would be responsible for supervising Campbell, except for state unemployment purposes. Further, the parties agreed it was Dowd Development's sole responsibility to protect its valuables.

¶ 29 Pursuant to the addendum in question, ProEmp was responsible for on-site supervision of Campbell for one purpose, state unemployment, and no other. Section 2732.305 (56 Ill. Admin. Code 2732.305 (repealed effective January 2001)) governed whether an employee leasing company or its client would be considered a worker's employer for purposes of the Unemployment Insurance Act. Although this administrative rule was repealed effective January 2001, it was valid when the addendum was signed.

¶ 30 Dowd Development, pursuant to the terms of the contract, agreed to be responsible for supervising and directing Campbell without limitation. The addendum was a limited exception to this general provision. The contract clearly states:

"If employees are required, in the course of their duties, to deal with confidential information, cash or any high value item, [Dowd Development] will institute procedures to safeguard such items. It shall be the sole responsibility of [Dowd Development] and not of [ProEmp] to protect such valuables."

¶ 31 Although Dowd Development cites section 45 of the Employee Leasing Company Act (215 ILCS 113/45 (West 2012)) as support for its arguments against ProEmp, we fail to see how this section is even relevant to this case. Section 45 (215 ILCS 113/45 (West 2012)) makes clear it is "[s]ubject to any contrary provisions of the contract." As stated earlier, the contract between Dowd Development and ProEmp contained provisions controlling who was responsible for supervising Campbell, specifically with regard to handling money.

¶ 32 B. Count II (Negligent Supervision)—ProEmp

¶ 33 Count II of the second amended complaint alleges ProEmp is responsible for the negligent supervision of Campbell. The trial court ruled the *Moorman* doctrine (see *Moorman Manufacturing Co. v. National Tank Co.*, 91 Ill. 2d 69, 435 N.E.2d 443 (1982)), bars plaintiffs' negligence claim. Plaintiffs' entire argument on this issue is as follows:

"Plaintiffs assert that the *Moorman* doctrine *** fails to provide a remedy in the law for injuries and wrongs received by them to their property in violation of Article 1, Section 12 of the Constitution of

the State of Illinois, in the event that this Court does not find that the Plaintiffs have stated a cause of action in Count I."

We find this argument forfeited pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. June 4, 2008). We cannot allow plaintiffs to dump the burden of argument and research on this court. See *Campbell v. Wagner*, 303 Ill. App. 3d 609, 613, 708 N.E.2d 539, 543 (1999). Regardless of the forfeiture, we fail to see how ProEmp could be guilty of negligent supervision of Campbell where the contract provided Dowd Development was responsible for instituting safeguards if Campbell dealt with valuables.

¶ 34 C. Count III (Breach of Contract)—Tarro

¶ 35 Count III of plaintiffs' complaint alleged Tarro breached his oral agreement with plaintiffs—to investigate and report why there was less cash flow than expected from Hickory Point Plaza and Executive Development—by (1) failing "to properly investigate the cause of the cash flow *** being less than expected with the ordinary skill and diligence of a reasonably careful accountant," (2) stating the "cause of the cash flow *** being less than expected was a result of the cash flow being used to pay off the debt *** early when he knew or should have known that the statement was not true," (3) failing "to ascertain the truth of the statement that the cause of the cash flow *** being less than expected was a result of the cash flow being used to pay off the debt *** early," and (4) failing to warn Dowd and Eldridge "that the records, items and documents which [Tarro], his agents and employees, requested to be transmitted to [them] for the preparation of tax returns did not provide enough information for [Tarro] to investigate the cause of the cash flow *** being less than expected."

¶ 36 According to plaintiffs' complaint, the contracts in question were created when David Eldridge and Dowd each approached Tarro in the year 2000 and subsequent years after

receiving their respective annual state and federal income tax returns. Both Eldridge and Dowd asked Tarro why Hickory Point Plaza and Executive Development "did not have the cash flow [each] expected them to be creating." Tarro told the men he would answer the inquiry after he investigated. Two to four weeks later, Tarro told David and Dowd Hickory Point Plaza and Executive Development did not have the expected cash flow because the cash flow was being used to pay off the debt owed by Hickory Point Plaza and Executive Development early. Plaintiffs allege this happened each year thereafter on multiple occasions. In November 2007, plaintiffs allegedly discovered the real reason why cash flow from both Hickory Point Plaza and Executive Development was less than plaintiffs expected—Campbell's embezzlement.

¶ 37 Based on these verbal exchanges, plaintiffs contend a series of contracts were formed between plaintiffs and Tarro. According to plaintiffs, "[t]here were no issues then and there are no issues now of what the parties expected to be performed by each side." The allegations made by plaintiffs in this case do not reflect this to be true.

¶ 38 Prior to July 1997, plaintiffs hired Tarro pursuant to an oral contract to provide financial, accounting, and tax preparation services without limitation for a fee. Plaintiffs do not allege performing audits on Dowd Development or any of plaintiffs' holdings was part of this contract. Further, plaintiffs do not allege policing the activities of Dowd Development employees was part of Tarro's contractual obligations.

¶ 39 Instead, plaintiffs' breach-of-contract claim centers on other oral contracts, which they allege were formed when David and Dowd each approached Tarro and asked why Hickory Point Plaza and Executive Development did not have the cash flow each of the men expected the businesses to be creating. According to plaintiffs, each time Tarro was asked, he responded he would answer their inquiry after he investigated.

¶ 40 Even assuming all of plaintiffs' allegations are true, the alleged contracts at issue here—which according to plaintiffs required Tarro to detect embezzlement by Campbell in response to a simple inquiry regarding cash flow—are not valid. Our supreme court has stated:

"The principles of contract state that in order for a valid contract to be formed, an 'offer must be so definite as to its material terms or require such definite terms in the acceptance that the promises and performances to be rendered by each party are reasonably certain.' [Citations.] Although the parties may have had and manifested the intent to make a contract, if the content of their agreement is unduly uncertain and indefinite no contract is formed. [Citations.]

* * *

A contract may be enforced even though some contract terms may be missing or left to be agreed upon, but if the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 29-30, 578 N.E.2d 981, 983-84 (1991).

Based on the allegations in this case, which we must consider as true for purposes of this appeal, we have no way of determining whether the alleged contract at issue has been kept or broken.

¶ 41 Plaintiffs do not allege Tarro failed to investigate. Instead, they allege Tarro did not "properly investigate." However, as we stated earlier, the parties did not specify the extent of the investigation Tarro would perform. The terms of any agreement between Tarro and plaintiffs to determine why there was less cash flow than expected did not require Tarro to discover

Campbell—whose job duties working for Dowd Development included transmitting financial information to Tarro and communicating with Tarro regarding that information—was stealing money from Hickory Pointe Plaza and Executive Development and hiding her activities through deceptive bookkeeping. This is especially true considering plaintiffs gave no indication to Tarro they suspected any kind of foul play. We also note plaintiffs do not allege the information and records Dowd Development provided to Tarro did not show (at least on paper) part of the cash flow from Hickory Point Plaza and Executive Development was being used to pay debt early. In other words, plaintiffs do not allege Tarro's responses to David's and Dowd's inquiries (regardless of the fact his responses were later discovered to be factually inaccurate) were not supported by the information and records provided to him by Dowd Development.

¶ 42 D. Count IV (Negligent Representation)—Tarro

¶ 43 In count IV of their complaint, plaintiffs allege Tarro is guilty of negligent misrepresentation because he provided them with inaccurate information when he said Hickory Point Plaza and Executive Development were paying off debt early. Our supreme court has held:

"To state a claim for negligent misrepresentation, a plaintiff must allege: (1) a false statement of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage to the other party resulting from such reliance; and (6) a duty on the party making the statement to communicate accurate information." *First Midwest Bank, N.A. v. Stewart Title Guaranty Co.*, 218 Ill. 2d 326, 334-35, 843 N.E.2d 327, 332 (2006).

Plaintiffs' complaint fails to state a cause of action for negligent misrepresentation because plaintiffs do not allege Tarro intended to induce plaintiffs to act in response to the inaccurate information he provided regarding the early payment of debt.

¶ 44 E. Counts V & VI (Breach of Contract and Negligent Representation)—Sleeper

¶ 45 The trial court did not err in dismissing counts V and VI, alleging breach of contract and negligent representation against Sleeper, for the same reasons this court provided above with regard to counts III and IV.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated above, we affirm the trial court's order dismissing plaintiffs' claims against ProEmp, Tarro, and Sleeper in this case.

¶ 48 Affirmed.